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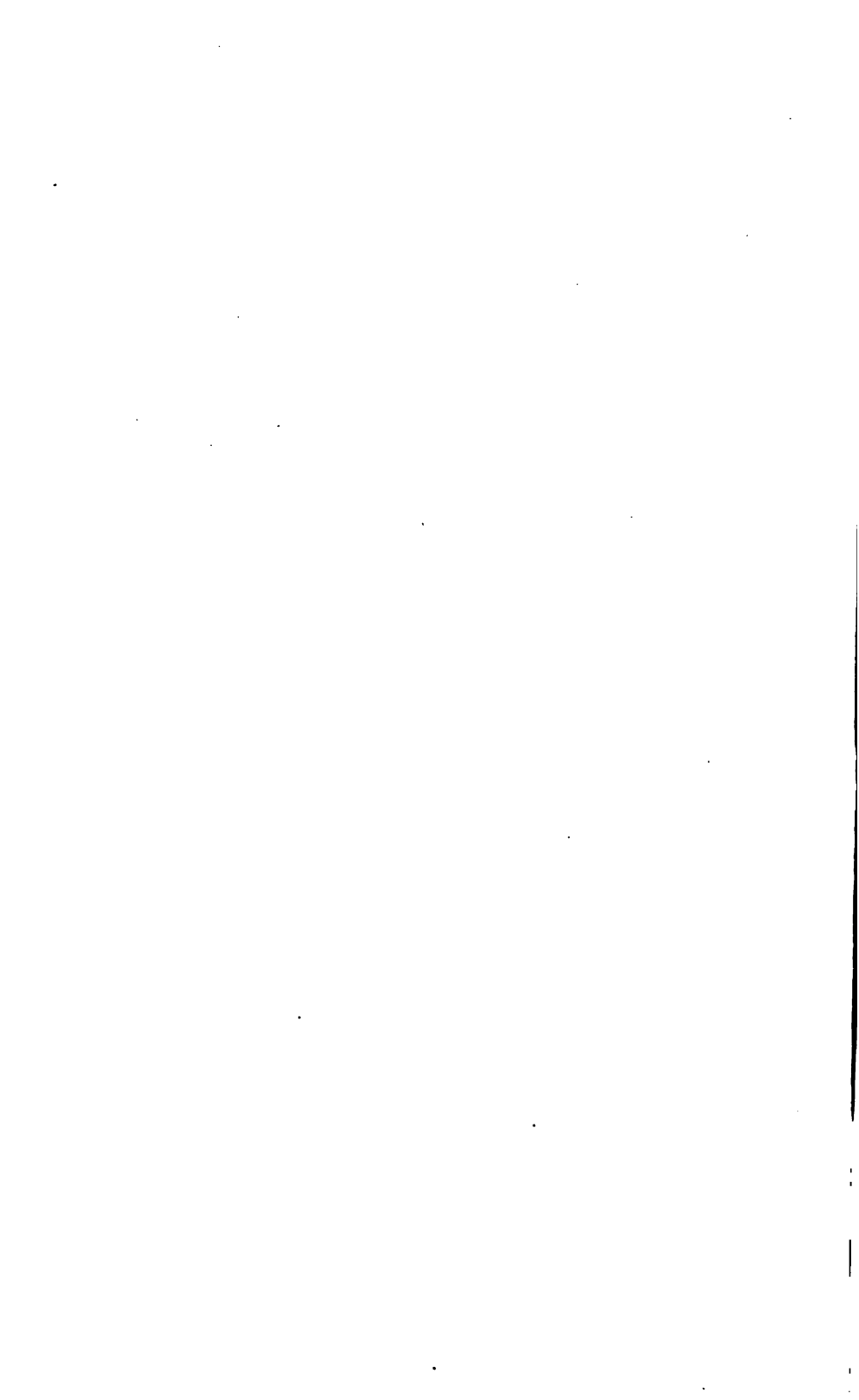












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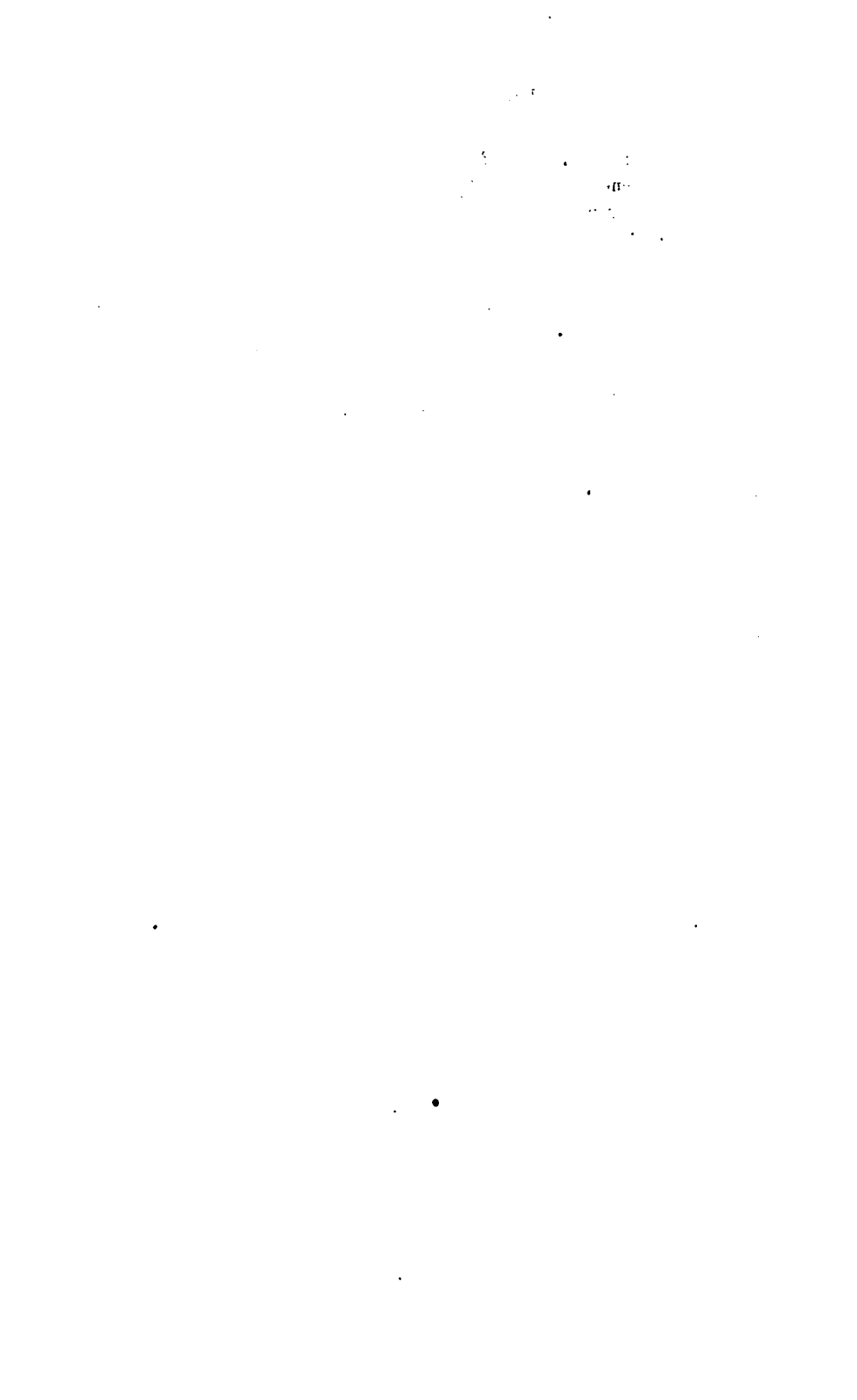
## ERRATA.

Page 2, line 11, for "practical," read "practicable."

Page 4, line 2 from bottom, after "him" insert "with whom he is sought to be identified."

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THE  
AMERICAN LAW REGISTER.

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JANUARY, 1869.

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THE LEGAL RELATIONS OF PHOTOGRAPHS.

PHOTOGRAPHY is not only an interesting art, esthetically considered, but it is capable of important scientific applications. The public are familiar with its employment in the delineation of anatomical specimens and of all natural historical objects. It has also long been used for the purpose of identifying criminals. These, however, are but a few of the many applications of the art, which either have been suggested or, as civilization progresses, will be made, for purposes analogous to those indicated above, that is, either to transcribe and fix for the information of scholars or of strangers the features and other physical peculiarities of objects or persons that are absent, but about whose identity there is no question; or to aid in the identification of things or persons present, with others that are absent, but whose photographs are at hand. Thus—for the purpose of identification—an English law magazine has lately proposed that there should be appointed a public photographer, whose duty it should be to take and register the likenesses of all persons leaving England, and, once in every five years, of all persons residing in England—each person, with his photograph thus taken, to deposit also his autograph: *Solic. Jour. and Reporter*, for June 27th 1868. In the United States, it is said, the directors of the Park Bank of New York, establishing regulations for their new safe-deposit vaults, have adopted the idea of identifying each holder or lessee of a safe by his own *carte-de-visite* previously taken and attached to his own folio or safe num-

ber. It has also been suggested that to the "paper" of every person who becomes naturalized, there should be attached his photograph, either fastened there by the official seal of the judge or commissioner, or taken by an official photographer on the paper itself. So, for the other purpose indicated, photography has lately been employed in England in a manner equally novel and interesting. Candidates for election to Parliament have, in some instances, it is said, instead of resorting to personal solicitation of votes, issued addresses containing, besides a declaration of principles, photographic likenesses of themselves. These all seem to be practical uses of the art; but others may be imagined of both kinds which would result in material advantage in the administration of justice and at the same time have an important bearing on the spread of civilization.

Thus—to aid in the identification of persons—the endorsees of drafts or letters of credit might be required, in important cases, to exhibit with the paper they hold their photographic likenesses with the endorsements under which they claim written upon their margins. So, a party seeking a divorce from an absent husband or wife, might be required to produce their marriage certificate containing the photographic likenesses of both, taken at the time of the marriage, by an official photographer; or to present the photograph of the person from whom a divorce is sought, and prove the identity *aliunde*. So, all persons enlisting in the army or navy might advantageously be photographed by an official photographer; all persons travelling as agents for commercial houses or acting otherwise in such a capacity as to make an identification desirable to those with whom they act. So, for the purpose of accurate delineation, many new uses may be imagined. Thus—not to mention that large class of cases in which the art might be employed with great advantage in describing goods and chattels, and even real estate, to persons at a distance with whom the owners were in treaty for the sale of them—in all cases in our courts where, as in chancery causes, the depositions of witnesses not present are read, it would aid much in weighing their testimony, if their photographs were appended to their depositions. An official photographer might, on the suggestion of counsel, be present and take the likenesses of each witness, if desired, not only in his tranquil moods, but in moments of excitement or of embarrassment under cross-examination—the artist and his appa-

ratus being so placed, perhaps, as not themselves to be a cause of trepidation. The same advantage would follow from the accurate presentment of the moral, as determinable from the physical, qualities of witnesses, by photography, in many cases tried on appeal, where the result depends on the testimony of witnesses not present. So, where questions arise at *Nisi Prius* as to the genuineness of the alleged handwriting of a party, and the case is appealed, the difficulty of presenting the supposed spurious paper to the appellate court would be obviated by using a photographic copy. So, where an issue is made up as to the validity of a will—the will being contested on the ground of want of testamentary capacity, from imbecility, insanity, &c., it cannot be doubted that material aid in arriving at a just result might be derived from a photograph of the testator, taken by an official artist, in the act of signing the will, in the presence of the attesting witnesses. So, where a homicide has been committed, it is always important to ascertain as well the condition of the body when discovered as its position or relation to surrounding objects. In trials for murder or manslaughter, much time is very properly occupied in determining these circumstances from the imperfect and conflicting statements of witnesses, or from the rude plans and drawings of such artists as may be in the vicinity. It is obvious that were there an official photographer charged by law with the duty of taking views of the body and its surroundings in every case of homicide, and were it made the duty of the police or other executive authorities, before any change in the condition or relations of the body has taken place, to cause the official photographer to be present for the purpose indicated, the ascertainment of the facts relating to the killing would be much facilitated. And particularly would this be the case were the same precaution taken whenever any person is arrested charged with the crime, and the accused is to undergo the ordeal of a public interrogation before a magistrate or by the officers in charge. The official artist would preserve the lineaments of guilt or innocence as presented when the nature of the charge was communicated to the prisoner, and his protestations of innocence were uttered. I shall mention but a single other case in which the art might be similarly employed, and that is, where affrays or riots occur in large cities. The Emperor Napoleon is said to have so reconstructed the city of Paris, that there is no street or avenue, which could be barri-

caded in case of a revolt of his subjects, that cannot now be swept by his batteries. So, it is not unreasonable to suppose, that when the art of photography is perfected, the streets and alleys of our great cities will be swept by photographic batteries, so located as to take, from many points of view at once, the likenesses of persons engaged in disturbing the peace, for use in subsequent legal examinations. The details of the process, including the collateral incidents which science may devise to render it effective, such as lights thrown upon the mob to bring into relief in the night or in cloudy weather the individuals composing it, I shall not attempt to give. That is the business of those charged with the improvement of photography. All I affirm is, that the art is capable of such an extension; and I need not add that to apply it thus successfully would be of advantage in the administration of justice equal to that which resulted from the employment of street-lamps in cities—one of the most efficient causes, as historians admit, of the diminution of crime and of the consequent advance of civilization, that have ever existed.

The principal object of this paper, however, is, to determine the evidentiary rank of the products of the photographic art. Is a photograph, considered as a narration or delineation of facts, a piece of hearsay, or of original and direct, evidence? Let us look at it as employed for each of the two purposes indicated, that is, first, for that of identification, and, secondly, for that of mere delineation of features or qualities. Before proceeding to do this, with respect to the former, we must determine what is involved in the process of identification of a person or thing as ordinarily effected in a court of justice. In identifying a person a witness is produced and required to compare the person presented for identification with him with whom he is sought to be identified, as the latter remains pictured in the witness's mind; that is, with the conception or image of him existing in his "mind's eye." So, if the identification be of one physical object or place with another; the same act of comparison of the thing presented with a mere mental image or idea of it, is required of the witness.

Now, let us suppose a photograph to be employed for the same purpose: a witness—he may be an expert—would be asked to compare the person proposed with a likeness or image of him formed, not by the mysterious operation of vital laws and forces

but by the subtle actions of chemical agencies; formed, too, not in the brain or upon the retina of the eye of the witness, but upon the equally faithful and far more durable tablet used by the photographer. The question is, are these processes so far identical as to entitle the corresponding steps in both to the same rank as evidence.

The process is, doubtless, in one respect, more complex, when conducted with than without the use of the photograph. Without it the image which forms the standard of comparison is one created in the brain of a person who stands at once as photographer and identifying witness; with it, the photographer or other person vouching for the genuineness of the photograph, and the witness making the comparison, would commonly be different persons, and the image a *tertium quid*, extraneous to both.

This disadvantage, however, is compensated for by the greater certainty, when the photograph is employed, that the image forming the standard of comparison is neither a compliment nor a caricature. The photographic apparatus never intentionally falsifies nor do its products ever so fade as to distort the image they present, as do the figures of things committed to the treacherous memory of men. The comparative certainty of the two processes may be inferred from a single example. The heir to an estate has been a long time missing. A photographic likeness of him, as he was about the time of his disappearance, is preserved. A person presenting himself and claiming the inheritance, an issue is made up to determine whether he is the true heir or not. Witnesses speaking to his identity must rely wholly upon their recollections of what he was when they last saw, or used to see, him—a method involving every kind and degree of error to which the human mind is subject. Let witnesses, now, be shown a photographic likeness of him, proved to be genuine, and be required with it to compare the person proposing himself for identification, and the sources of error would be sensibly diminished. Others, it is true, might exist, peculiar to this mode of identification, by which the balance might, in a measure, be restored. Thus, the fact that the comparison would be of a living person, whose face might present many different phases in as many seconds, with a lifeless image, in which there may have been fixed by the imperfect methods of the art, a fleeting or unusual expression of its

original, or a sheer vacuity of features without expression, would certainly tend to restore it.

Without stopping to insist, on the other hand again, on what is very evident, that the memory of features and of delicate shades of expression is never perfect, and is often very defective, and that, during the lapse of years, such changes of feature, complexion, or expression may have occurred as to put at fault those whose memory of faces is best, I will observe that it is not so much my purpose to strike a balance of advantages between the two methods of identification, as to ascertain their relative rank as evidence, leaving the weight of each to be determined as in other cases.

The testimony of a witness comparing a person present with the remembered image of a person absent, is, in all its parts, original evidence. Ought we to rank as secondary evidence either of the three elements of the process of identifying a person by his photograph, which follow, namely, 1. The establishment by proof of the genuineness of the photograph; 2. The statement or narration of facts made, if I may so say, by the picture itself; and, 3. The comparison, by witnesses, or by a jury directly, of the person offering himself, with that picture?

At first view, doubtless, a photograph seems a mere piece of hearsay evidence. It is what the witness vouching for its genuineness says, the photographic apparatus, acting in conjunction with sunlight and chemical reagents at the time of taking it, affirmed to be an accurate likeness of the person who sat for it. It differs from hearsay, however, in one essential particular; it is wholly free from the infirmity which causes the rejection of hearsay evidence, namely, the uncertainty whether or not it is an exact repetition of what was said by him whose testimony is repeated by the witness. In the picture we have before us, at the trial, precisely what the apparatus did say. Its language is repeated to us, syllable for syllable. Disclaiming any knowledge as to the name or identity of the original, the apparatus says:—"His features, size, shape, apparel, and surroundings were so and so." The vouching witness completes the narration thus left imperfect by locating and naming the person whose picture it is, and this latter, all will agree, is original evidence. Is not that of the picture equally original? Or, if a difference exist, should we not give the greater credence to the photograph, whose testimony, we

know, is perfectly truthful and generally commensurate with the fact, while that of the vouching witness, and also of the witness called to speak to the question of identity, may be mistaken or perjured?

If any one supposes that when a photograph is used to aid in the identification of persons, the evidence is less entitled to rank as original evidence, than that of a witness identifying a person by comparison with an image in the witness's mind, let him analyze the process in the latter case. To make such a comparison, the witness must first recall an image, formed, perhaps, years before, on the retina of his eye, by the natural processes involved in the act of vision; and then, with this image, compare the person proposed. Is the faculty of vision never at fault? May not the person seeing be mistaken in supposing it was A., rather than B., whom he saw, even when the image is recent; much more, when it is ancient and faded, from the imperfection of his memory? If, on the other hand, we feel such a degree of confidence in the accuracy of the representations made by the eye, notwithstanding the many sources of error to which vision is subject, that we accord to the evidence in question the rank of original evidence, why should we rely less confidently on the trustworthiness of photographic testimony, which is free not only from all moral bias, but from nearly every conceivable physical cause of error? We know that the photograph is not the work, in any respect affecting its truthfulness, of a human brain, but of natural forces, which, experience teaches, generally speak the truth without flattery or detraction. If I am correct in this, a photograph, proved to be that of a person absent, is that person himself, *precisely as he exists in the article of vision*—is, therefore, direct and original evidence of the kind of man he was. So, of the photographic likeness of any natural object or place. When shown to be the photograph of the place or object, it is original—that is, legally speaking, the best—evidence of its features and relations; as much so as the testimony of a witness speaking from memory of the same features and relations. And, in general, whenever the art of photography is employed to delineate for the information of others the features and expression of a person, or the condition and relations of an object, whose identity is not in question, its products are so veracious as to entitle them to rank, not as hearsay or secondary, but as original, evidence. How important this



is, practically, may be seen from the example given above of a photograph taken of a body and its surroundings after a homicide has been committed. If the picture is secondary evidence, it could not be offered, whilst there were, as there always would be, witnesses who could speak of those circumstances from their own knowledge, since their testimony would, in law, be the best evidence. On the contrary, the really best evidence, as every one must perceive, would be that given by a photograph. Its testimony in relation to the enumeration and grouping of details, would be perfectly exact; and, in relation to their perspective, and, often, to their coloring, it would be nearly so. This use of the art, however, having a less intimate connection than the other with the administration of justice, I shall not dwell further upon it in this relation. As furnishing a cause of action in suits for damages, but one or two cases occur to me. One would be, when a photograph clandestinely taken, and representing its original in a ridiculous light, or publishing his personal defects, should be uttered maliciously, to his damage. Such a picture would doubtless be a libel in all our states, and particularly in those in which the old maxim, "The greater the truth, the greater the libel," is still in force. So, if a likeness, once lawfully taken, were, without permission, to be multiplied for gain, the artist reckoning on the beauty or distinction of the original for an extensive sale, it might be considered whether there was not a violation of a sort of natural copyright, possessed by every person of his or her own features, for which the courts would be bound to furnish redress. If the newspapers are to be trusted, a case of the kind has lately occurred in Europe. An artist multiplied the likeness of a lady of high rank at the Austrian court, and sold the copies as the photograph of some notorious woman in another city. Suit was brought by the injured lady and a judgment recovered. What was the ground or the nature and extent of the recovery, we are not told. Special damage may have formed the basis of it; but it cannot be doubted, that had there been none, her right to control the market of her own beauty could not have been denied her by any court, and that she must have recovered on the ground that that right had been infringed, if on no other.

J. A. J.

## RECENT AMERICAN DECISIONS.

*Supreme Court of Errors of Connecticut.*

## THIELUS TODD AND OTHERS v. WILLIAM P. AUSTIN AND OTHERS.

The Act of 1864, known as the Flowage Act (Rev. of 1866, p. 89), is not unconstitutional. The decision to this effect in *Olmstead v. Camp*, 33 Conn. R. 532, confirmed upon full argument.

It is no objection to proceedings under the Flowage Act, that the mill is not on the same tract of land upon which the dam is sought to be erected, and that land belonging wholly to other parties lies between.

Where the petitioners had called on two landowners to state on what terms each would allow his land to be flowed, and one had declined to give any answer and the other had demanded more than the petitioners were willing to give, it was held to be a case where the parties were "unable to agree as to the damages to be paid," within the meaning of the statute.

Where the committee, upon a petition for authority to raise an existing dam to a greater height, in their report stated the authorized height merely as so much additional height to the existing dam, it was held that they had fixed the height with sufficient certainty.

The provision of the state constitution (Art. 1, § 11), that private property shall not be taken for public use without just compensation, is not to be regarded as a grant of power to the legislature, but as a restriction upon the exercise of the right of eminent domain already existing. [BUTLER and CARPENTER, JJ.]

The legislature may lawfully grant rights of easement to individuals or corporations to enable them to erect and operate structures, if the result of their operation is the production of an article or thing intended to be furnished or sold to the public for a beneficial use, and to supply their reasonable wants. [BUTLER and CARPENTER, JJ.]

PETITION under the Flowage Act, praying for authority to raise a mill-dam above its existing height, and for the assessment of damages to the several respondents, whose lands would be overflowed thereby. There were three petitioners, and the petition alleged that they were severally the owners of mills on Stony Brook, running out from Paug Pond, and that all their mills were supplied with water from the pond, the dam being situated at the outlet of the pond. The petition was brought to the Superior Court in New Haven county, and was referred to a committee, under the statute, who reported:—

That the flowing of the land would be of public use; and the height to which the dam might be built by the petitioners to be "such a height as will raise the water of Paug Pond three feet above the height to which the waters of the pond would be raised

by the dam as it stood at the date of the petition, namely, on the 23d day of February 1865."

The committee then assessed the damages of the respondents, and further reported:—

"That the dam is situated on a piece of land belonging to the petitioners, separated from each of the pieces of land on which the water-mills and manufacturing establishments of the petitioners are situated, by several intervening pieces of land belonging to several and different owners, and not belonging to the petitioners or any of them."

The respondents excepted to the report, because the dam is not situated on the same land upon which any of the water-mills mentioned in the petition are located; because testimony that the flowing of the lands in the manner proposed would be of public use was inadmissible, and the committee were not authorized to inquire whether or not it would be of public use to flow said lands by means of a dam erected upon land no part of which was connected with or attached to the land upon which any one of the water-mills mentioned in the petition was located; because the act under which the proceedings were had is unconstitutional, and because the finding and report of the committee are indefinite, vague, and uncertain, and not in conformity with the requirements of the statute, and do not show with certainty the height to which said proposed dam may be raised, nor will the record show with certainty the matter attempted to be determined.

The respondents also filed an answer, denying that the erection of said dam is or will be of or for public use; and moved that the court shall inquire for itself whether the erection of said proposed dam is or will be of or for public use.

The Superior Court (PARDEE, J.) overruled the exception, accepted the report, and decreed accordingly.

With regard to the raising of the dam being of public use, the court found "that the raising of said dam in the manner and to the extent recommended in the report of said committee, will furnish such increased quantity of water for the use of the several mills on Stony Brook, which are described in detail in said petition, as will enable the owners thereof to operate them during portions of the year in which they cannot now be operated by reason of an insufficient supply of water, and will thus increase the power, value, and usefulness of said several mill privileges,

and therefore is of public use; which fact is found upon evidence the whole of which was objected to by the respondents."

With regard to the parties being unable to agree as to the damages to be paid, the court found that the petitioners, prior to the bringing of the petition, asked the respondents, William, Joel, and Horace Austin, to state the price for which they would convey to them the right to flow so much of their land as would be covered by water in consequence of raising the water in the pond to the various heights of two, three, and four feet above the point to which it could be raised by the dam then existing at the outlet of the pond; in reply to which they stated certain terms which the petitioners were unwilling and refused to accept; and these respondents made no other proposition. Also that the petitioners applied to the respondent Elliott to state to them the price for which he would convey the right to flow his land, by raising the water in the pond three feet higher than it could be raised by the dam then existing; to which he declined to make any answer. The court thereupon found that the petitioners were unable to agree with the respondents, or either of them, as to the damage, or as to the judgment that should be rendered.

The respondents brought the record before this court by a motion in error.

*H. B. Harrison* (with whom were *Blackman* and *Elliott*), for the plaintiffs in error.—1. The Flowage Act is unconstitutional. It is not within the constitutional power of the General Assembly to authorize, directly or indirectly, one man to take and appropriate to his private use (either with or without compensation) the property of another: *Varick v. Smith*, 5 Paige 137, 159; *Matter of Albany Street*, 11 Wend. 148; *Wilkinson v. Leland*, 2 Peters 627; *Hay v. Cohoes Co.*, 3 Barb. 47; *Hartwell v. Armstrong*, 19 Id. 166; *West River Bridge v. Dix*, 6 How. 544; *Bradley v. N. York and N. Haven Railroad Co.*, 21 Conn. 305; *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Id. 19, 38; *Woodruff v. Neal*, 28 Id. 169; *Taylor v. Porter*, 4 Hill 140; *Clack v. White*, 2 Swan 540; *Sadler v. Langham*, 34 Ala. 311; *Harding v. Goodlett*, 3 Yerger 41; *Commonwealth v. Sawin*, 2 Pick. 548, 549; *Commonwealth v. Cambridge*, 7 Mass. 158, 167; Constitution of Conn., Art. 1, §§ 8, 9, 11, 12, 21. The reasoning by which courts in certain states have sustained the mill acts of those

states does not apply in support of this law. The mill acts of Massachusetts, for instance, rest upon peculiarities of the common law of that state in relation to the rights of proprietors of land traversed by mill-streams—peculiarities directly in conflict with the common law of England and of Connecticut: *Murdock v. Stickney*, 8 Cush. 116; *Bates v. Weymouth Iron Co.*, Id. 548; *Jordan v. Woodward*, 40 Maine 322; *Williams v. School District*, 33 Vt. 278; *Newcomb v. Smith*, 1 Chandler 71; *Ingraham v. Hutchinson*, 2 Conn. 590; *King v. Tiffany*, 9 Id. 168; *Buddington v. Bradley*, 10 Id. 218; *Parker v. Griswold*, 17 Id. 288; *Thurber v. Martin*, 2 Gray 394; *Thompson v. Crocker*, 9 Pick. 59; Angell on Watercourses, § 340.

2. At any rate, the act, if constitutional, “steps to the verge of the constitutional limit,” and must be construed with the utmost rigor against those who try to seize property under it, and in favor of those whose property they try to seize. No proceeding under it should be sustained unless it is brought within both the letter and the spirit of the act: *Nichols v. Bridgeport*, 23 Conn. 208; *Jordan v. Woodward*, 40 Maine 322; *Williams v. School District*, 23 Vt. 278. This case does not come within either the letter or the spirit of the act. The act provides only for those cases where the mill and the dam are on the “same” piece of land and under the control of the same person. It does not authorize, or intend to authorize, any petitioner to flood the land of a respondent, except in a case where the petitioner possesses the right of turning to some use the privilege seized by him under the act. If the mill is separated from the dam by land not owned or controlled by the petitioner, then the petitioner, after raising his dam to the injury of the respondent, will not be able to apply to his mill the water thus obtained. The words “on the same,” in section 388, were accordingly introduced for the express purpose of preventing the act from applying to cases like this: *Farrington v. Blish*, 14 Maine 423; *Murdock v. Stickney*, 8 Cush. 117; *Bates v. Weymouth Iron Co.*, Id. 552.

3. It is not properly found, within the true intent of the requirement of section 388, that the petitioners could not “agree” with the respondents “as to the damages to be paid.”

4. The record does not “show with certainty the matter” that has been “determined,” within the true intent and meaning of the same section.

*Watrous and Rogers*, for the defendants in error.

MCCURDY, J.—The principal point raised in this case—the constitutional question—was decided, after full consideration, in the case of *Olmstead v. Camp*, 33 Conn. R. 532. But as the question was one of great interest, and it was suggested that new views might be presented bearing especially on the particular facts of this case, a very elaborate argument was again listened to by the court.

It was claimed that in Massachusetts, where the flowage laws were said to have originated, and where they have been more frequently discussed and sustained than in any other state, principles in relation to the rights of mill-owners and riparian proprietors have been recognised as a part of their common law somewhat different from those which exist in this state and elsewhere.

However this may be, we do not understand that in that state, or in any other of the many which have enacted and upheld such laws, their defence has been placed upon any peculiarity of their common law. They are everywhere justified upon the broad ground of a paramount right of the government to take private property, upon making compensation, in cases of necessity or great public utility. It is this general authority, which, in the opinion given in the case referred to, we have endeavoured to explain and sustain by considerations which seemed to be appropriate. We see no occasion to change the views then expressed.

But it is urged that the statute provides only for a dam to be raised on the land of the mill-owner or that of another by his consent, and if it is erected on the land of the mill-owner, it must be on the identical tract on which the mill stands; and it appears in this case that the dam stands on a lot of the petitioners separate from the mill-site; the land of another person lying between the two tracts. We are unable to see any force in this objection. The object of the clause relied on is to require that the dam shall be built on a site where the owner has a right to place it. This right may result from his own ownership or from an agreement with the proprietor. The words "on the same" refer to the antecedents, "his own land" or "land of another." There is no conceivable reason for requiring the mill and the dam to be on precisely the same tract.

The respondents further object that it does not sufficiently appear that the parties were not able to agree in relation to the damages. This is a question of fact, and the Superior Court has found that they were unable to agree. If it were proper to re-examine the question, we should conclude that the evidence abundantly justified the finding. The petitioners called on the respondents to state their terms for the privilege of flowing. One party made no answer, and the other named so large a sum that the proposition was rejected.

Another objection to the report of the committee is, that they do not establish with sufficient certainty the height to which the dam may be raised. It would unquestionably have seemed more definite if they had established the height by marks upon a rock, or pillar, or some other permanent object. But we have a right to presume that the height to which the petitioners were entitled was well known and established by some such mark, and the committee, taking that for their basis, allow a certain number of additional feet.

We see no error in the proceedings, and the decree is affirmed.

In this opinion PARK, J., concurred.

BUTLER, J.—I was fully satisfied at the conclusion of the argument in *Olmstead v. Camp*, 33 Conn. 532, that the flowage law was sustainable upon strict and recognised principles of constitutional law; and a re-examination of the question has confirmed, rather than shaken, that opinion.

Like every other question of constitutional power exercised by the legislature under our state constitution, it presents itself to the mind in a three-fold aspect, and logically involves a three-fold inquiry.

First.—Whether the power exercised is delegated by the people to the legislature in and by the constitution specifically, or by a general grant of power sufficiently comprehensive to embrace it.

Second.—Whether the exercise of the power as exercised conflicts with the Constitution and laws of the United States, or with any other provision of the constitution of this state. And,

Third.—Whether the exercise of the power in the particular case and manner is contrary to natural justice. For, as it is to be conclusively presumed that the people, while possessing the power,

would not have exercised it contrary to that fundamental principle of the social compact, it is in like manner to be presumed that they did not intend to delegate and have not delegated the power so to exercise it to the legislature. An unjust use of the power is therefore an abuse of it and void.

We come then to the application of these inquiries to the case in hand. And first,—What is the power which has been exercised, and is it delegated in the Constitution?

The power exercised is the right of eminent domain, which is a part of the legislative power, and is unquestionably delegated in the 1st clause of the 3d article of the Constitution. This right is a paramount right attached to every man's land, and he holds it subject to its exercise. Bouvier defines it to be the right which the people or government retain over the estates of individuals to resume the same for public use; and that definition is sufficiently comprehensive and in accordance with the authorities.

2. The law in question does not conflict with the Constitution or laws of the United States, or any provision of the constitution of this state. There is a clause in the bill of rights requiring just compensation to be made when the power is exercised, and as a condition of its exercise. Much misconception has prevailed in relation to the nature of that clause, but it is simply a condition attached to the exercise of the right of eminent domain. It does not purport to be a grant of power, but recognises its existence. Its import is precisely what it would be if the language used had been, "the right of eminent domain shall not be exercised unless just compensation be made for the property taken." The convention which framed the Constitution of 1818 was composed of very able men, many of them distinguished jurists. They framed a constitution remarkably concise, clear, and unambiguous. Whatever they intended to say they said, and in simple language, so that it could be understood by the people. They knew, when they provided that the whole legislative power should vest in the legislature, that the right of eminent domain would vest as a part of it, and they did not except it. They therefore intended it should vest. So when they framed the condition to be attached to its exercise, they did not use the words "eminent domain," for those words would not have been intelligible to the people, but they did use the precise language employed by jurists to define and describe that right. It is evident therefore that they intended to attach



the condition to the *exercise* of that right merely, and there is not in that clause, or anywhere else in the constitution, ground for suspicion even, that they intended to define or limit in any way or manner the right itself. The law in question complies with the condition and is not in conflict.

3. The principal objections to the law are founded on the assumption that it is contrary to natural justice. I am satisfied that it is not. The right to take private property for public use, or of eminent domain, is a *reserved* right attached to every man's land, and paramount to his right of ownership. He holds his land subject to that right, and cannot complain of injustice when it is lawfully exercised. The right consists of two elements,—the right to take, and the right to judge of and determine the exigency and the necessity for taking it. These are both and equally vested in the legislature. Bouvier (Law Dictionary) says, "It belongs to the legislature to decide what improvements are of sufficient importance to justify the exercise of the right of eminent domain." And the authorities cited fully sustain him. It is for the legislature, therefore, to determine what is required by the wants of the people, or for the public good, in the exercise of a sound discretion. With the *bond fide* and not unreasonable exercise of that discretion courts cannot interfere. As the legislature in this case have exercised their discretion honestly, deliberately, and after much agitation of the subject, and the law is confessedly beneficial to the public interest, there would seem to be no question about its constitutionality.

But several objections are made on the ground that the right is limited to actual governmental or individual *use*, and they must be fairly examined.

The objections are made in various forms, but they may all be resolved, substantially, into two classes. The first class of objectors ignore entirely the fact that the right of eminent domain is granted in the constitution as part of the legislative power, and assume the grant to be by the clause in the bill of rights; and further assume that every man is the absolute owner of his property, and that the grant is an invasion of that ownership; and then argue that the grant is in derogation of common right, and to be strictly construed; and therefore that the terms "public use" should be construed to be a use by the government, its officers and agents only. As this objection is founded on an ignorance of

the existence of the right of eminent domain in the legislature independent of the clause in question, a false assumption in relation to the character of that clause, and a false assumption as to the absolute ownership of the property, and is wholly unsupported by authority, it is entitled to no consideration.

The second class of objectors concede the right of eminent domain in the legislature, but claim that the clause in the bill of rights is an implied prohibition against taking the property for any other purpose, and that the words "public use" must be construed to mean an *actual personal use* by the government or by individual members of the public. I do not think the claim that the clause in the bill of rights contains an implied prohibition is correct, or see its materiality if it is. It is the essence of the right of eminent domain that the property shall be taken "for public use," and the question remains open, what is the meaning of the words, and who is to determine what constitutes such use, whether there be such a prohibition or not.

But suppose it admitted that some actual use by the public is essential to the just exercise of the right of eminent domain, the law will still be constitutional.

This class of objectors concede that grants of rights of easement to railroad companies, water companies for the distribution of water in cities and villages, and gas light companies, are constitutional, because they say the public use them. But let us see what use the public make of them. A. takes his goods to the railroad, pays the freight to their place of destination, places them in the cars, or they are placed there by the employees of the company, and they are transported pursuant to his contract. Now to have the use of a thing in the sense in which the objectors use the words, is to have some exclusive occupation and control of it. What use or control has A. of the road, its equipments or operation, by reason of the fact that he has shipped his goods upon it? None whatever. If he can be said to use anything it is the *transportation*, the *result* or *product* of the use and operation of the road and its equipments by the company. Nor is the case different if he applies for transportation for himself, except in the deceptive particular that, being animate and having the power of locomotion, he is expected to place himself upon the train instead of being placed there by the employees of the company. In all other respects he is as much the *passive recipient* of

*transportation*, as the result or product of the operation of the road, as his inanimate goods. So too of the water power company. The public have no use of the franchise or structure, nor control of its operations. All they have is the use of the water delivered to them by the operation of the structures as used and controlled by the company. The same is true of the gas light company.

The following proposition then may be deduced from the three instances alluded to and conceded to be constitutional, viz. :

The legislature may lawfully grant rights of easement to individuals or corporations to enable them to erect and operate structures, if the result of their operation is the production of an article or thing intended to be furnished or sold to the public for a beneficial use, and to supply their reasonable wants.

This proposition covers the case in hand as perfectly as it does either of the other three, for the flowage law is intended to grant rights of easement which will enable individuals or corporations to enlarge or erect and operate structures, the result or product of the operation of which will be articles (such as cotton or woollen cloth and the like) intended to be sold to the public for their necessary and beneficial use. And if there be any element of public use in the other cases or either of them, it is contained in the law in question, and it is constitutional upon the principles claimed or conceded by this class of objectors.

But there is no *such* limitation, nor *any* specific limitation to the *bond fide* exercise of their discretion by the legislature, known to the law. The cases cited from Kent are not cases of limitation, but of arbitrary power, exercised pretendedly and fraudulently, under cover of the right. If the true nature of the right of eminent domain, and the true object and operation of the clause in the bill of rights are regarded, all difficulties vanish; and I have yet to hear or read the first argument or opinion adverse to the law in question, having any plausibility, which was not founded on a misconception of one or the other. A distinguished judge, even, speaks of the taking and grant "as a forced sale;" but if such were their character they could not stand an instant. The legislature cannot compel one man to sell to another. The true theory and principle of the matter is, that the legislature *resume* dominion over the property, and having resumed it, instead of using it by their agents, to effect the intended public good, and to

avoid entanglement in the common business of life, they revest it in other individuals or corporations, to be used by them, in such manner as to effect directly or indirectly, or incidentally as the case may be, the public good intended. And it is perfectly immaterial to the owner of the property in what manner the legislature use it or cause it to be used after they have resumed it and he is justly and fully compensated. He has on that account no ground for complaint. Upon the strictest principles, therefore, I consider the law constitutional.

Upon the other points I also concur with the majority of the court.

CARPENTER, J., concurred in both the foregoing opinions. HINMAN, C. J., dissented.

The importance and acknowledged difficulty of the question so extensively discussed in the opinion of Mr. Justice BUTLER in the foregoing case, would certainly justify an extended examination of its grounds. But we should not desire to do this, as a general thing, unless we felt some confidence we might aid in bringing the public opinion, or the judicial opinion of the public, to a different result at some future time. This is always hopeful, where the course of judicial decision is both wrong in principle and inconvenient in its practical operation. In such a case the inconvenience of the rule constantly prompts to revision and agitation until the obstinacy of judicial blindness is compelled to see, and to retrace its error. But where the error, in principle, is of so long standing as in the present case, and fortified by such repeated acts of legislative confirmation, and above all, where it is further supported by all public opinion, and the convenience of multitudes, against the remonstrances of here and there a churlish landowner, there is small hope that the speculative error of the law will ever be made so obvious as to induce the majority of judicial tribunals in the states where these "Mill

Laws" exist to retrace their steps, and declare them, or the decisions in regard to them, based on wrong grounds. There are two systems of "Mill Laws," one called the Massachusetts, and the other the Virginia system, with reference to the states where they had their origin. In the former the statute only gives the right to flow the land of another against his will, for the purpose of extending a mill-pond or water-power. There is here no attempt to take the land for, or to transfer any interest in the land to, the owner of the mill. And although the statutes, in some of the states, following this class of laws, may declare the right to flow the land for mill purposes, and to continue the dam after the recovery of damages for its continuance hitherto, yet this may be regarded as nothing more than the form of affirming that the party whose land is thus flowed shall have no redress, by way of injunction out of chancery, against continuing the dam, and no right to appeal to a common-law court to remove the nuisance, *prosterne nocumentum*, and no right to abate the nuisance by his own act; in short, that he shall have no remedy except to have his damages annually assessed by a jury. Treating the

statutes of this class as a mere prescription of the exclusive remedy for an acknowledged wrong, we see no very clear ground to complain of their constitutionality. But where it is attempted to be placed upon the ground of right, as coming fairly within the range of exercising the prerogative power of eminent domain, it has always seemed to us exceedingly questionable.

And we understand Chief Justice SHAW to have always placed the constitutionality of these statutes on other grounds than that of the exercise of the right of eminent domain by the sovereign power of the state: *Murdock v. Stickney*, 28 Cush. 113. But in *Talbot v. Hudson*, 24 Law Reporter 228, BIGELOW, C. J., seems to regard these laws as a mere assertion of the right of eminent domain. And the last case, as well as that of *Hazen v. The Essex Co.*, 12 Cush. 475, where the statute authorized one water-power to be so extended as to ruin another, there seems no very obvious mode of defending the proceeding, unless it can be done upon the plea that it is a legitimate exercise of the right of eminent domain. No other mode occurs to us at present, unless we can say that it is only the provision of a peculiar remedy in a special class of cases. And we might be satisfied with this view if the statute, in terms, or by fair construction, could be made to apply to classes of cases, as where one destroys property of another to escape greater loss himself. But it seems to be provided only for the particular cases, and not to come within the class of statutes affecting procedure, which always apply to classes of cases. It looks, therefore, in these cases, very much like the exercise of sovereign power under the claim of the reserved right to apply land, or the use of it, to public use. And in *Jordan v. Woodward*, 40 Me. 317, RICE, J., seems to treat the proceedings as the exercise of the right of eminent

domain, and declares that these "Mill Acts" are the taking of the use of one man's land for the benefit or use of another, and that this is going to the very extreme verge of constitutional right, and, if new, would be held unconstitutional. And the principal case, as well as that of *Olmstead v. Camp*, 33 Conn. 532, upon which the decision rests, are placed upon the ground of the lawful exercise of the right of eminent domain. And we understand the Supreme Court of New Hampshire have recently determined the same question, in a very elaborate opinion, which is not reported, but in which the court vindicate the constitutionality of these laws, and, as we infer, upon the ground of the right of eminent domain.

This is such an array of authority that we should have little hope of it ever being changed, and especially when these laws are so popular, and those who doubt their validity so little regarded. It seems to be a case where might makes right, by common consent, and the judiciary have no function remaining but to assign the best reason they can for a foregone conclusion. The case of *Moore v. Wright*, 34 Alabama 311, is the only case where these laws have been held unconstitutional, as far as we know. And this case was under a statute like those of Virginia. But we are not sure the cases differ essentially in principle, if both are attempted to be placed upon the ground of the exercise of the right of eminent domain. For in that view it cannot affect the principle very essentially whether you take the land or the use of it. And, indeed, there is no essential difference between taking a perpetual use of land and the land itself. The injury is much the same in either case.

But it seems to us there is an essential difference in the two classes of cases in one particular. In none of the Massachusetts cases is there any attempt to

transfer any estate in the land or in the use of it, from the owner, and to vest it in the millowner. In some cases the use is taken by the millowner and in others the mill is destroyed; but in neither case is any estate transferred. And if in both of these classes of cases the statute had simply provided that the injured party should only recover in a particular mode and to a certain extent, there could be no question of the validity of the statute. And it seems to us, from the reasoning of the judges in all the earlier Massachusetts cases, that there was no expectation of defending the constitutional validity of the statutes upon any such broad ground as that of eminent domain. PARKER, C. J., in *Sewall v. Flagg*, 11 Mass. 364, said the act seemed to be incautiously drawn upon the plan of, or in too close conformity with, the Colonial Acts.

But the statutes following the lead of those in Virginia must stand, if at all, upon the right of eminent domain, and this may have led to placing them all, of both classes, upon that ground. But it seems to us almost equivalent to saying, that the legislature may always take private property for the public good, and that is equivalent to saying they may always take it for what they regard the public good. For the public good is so indefinite a term, that courts will consider that the legislature must be as capable of deciding that question as any other tribunal. It being a question of fact, mainly, it is scarcely subject to revision by the courts. If there is any evidence of its being for the public good the act must stand—and a case will seldom occur that a statute would pass the legislature, on any ground, against

all the evidence of its character and quality.

It seems to us, therefore, that there is no security in giving this right of eminent domain so wide an extension. It becomes practically the same as saying the legislature may take private property when they choose, and apply it to such uses as they deem public uses. If it were limited to purposes of intercommunication, or education, or health, or public defences, or those well-known and clearly defined public uses for which all codes of law provide, there could be no uncertainty, and no cause for the exercise of arbitrary power, but where it is extended to mills of every class and character, most of which are mere pecuniary ventures, no more connected with public use than any other commercial enterprise, it may as well include public inns, or public stables, or hospitals, or asylums, or, indeed, almost any public comfort or convenience. We can only say that it seems to us exceedingly to be regretted that the doctrine of Chief Justice SHAW had not been more heeded and more strictly followed, but there is, perhaps, little hope it will ever be again possible to bring back the public mind to any such salutary rule. And we fear there is a growing laxity in regard to judicial constructions, based upon supposed public demand and modern advancement, which has no foundation in fact, and which will ultimately be sure to unsettle all the old foundations. We desire to disclaim all morbid dread of reasonable conformity to advancing developments. But the thing is a convenient cover for all error.

I. F. R.

*United States Circuit Court, Southern District of Ohio.***HENRY P. COOLIDGE v. COLUMBUS B. GUTHRIE.**

An officer commanding troops of the United States in an insurgent state, during the late civil war, seized property of a citizen of the state, and after acquiring firm possession, sold it to a third person. After the war the owner at the time of the seizure brought an action of trover for the value of the cotton against the purchaser, in the Circuit Court of the United States.

*Held*, That the court had no jurisdiction. The seizure was made as an act of war, and its validity was not triable in a municipal court, in a common-law proceeding.

That this defence was admissible under the general issue in trover.

That after complete possession of the cotton by the captor for twenty-four hours it became *booty* by the laws of war, and the title of the hostile owner was completely extinct. If the plaintiff in this case had any right it was against the United States.

THIS was an action of trover brought to recover the value of cotton mentioned in the plaintiff's declaration. The defendant pleaded the general issue. The parties submitted the cause to the court—waiving the intervention of a jury.

According to the statute regulating the practice in such cases “the finding of the court upon the facts—which finding may be either general or special—shall have the same effect as the finding of a jury.” \* \* “When the finding is special, the review” (by the Supreme Court of the United States) “may extend to the sufficiency of the facts found to support the judgment.” (Act of March 3d 1865, ch. 86, § 4, 13 Stat. 501.) As this case was important in the principles which it involved, it was deemed proper to find the facts specially.

The facts were accordingly found upon the evidence as follows :

1. On the 12th of July 1862, General Samuel R. Curtis, commanding an army of the United States, took military possession of the town of Helena, in the state of Arkansas. That state was then in rebellion against the United States.

2. The cotton was all raised upon farms belonging to General Gideon J. Pillow, who was, at the time of the seizure of the cotton, in the military service of the rebel government. The farms were in the immediate vicinity of Helena.

3. General Curtis ordered the cotton in controversy to be seized and brought into Helena; and it was seized and brought there

accordingly. The wagons conveying it were protected by troops detailed for that purpose.

4. He sold and delivered the cotton to the defendant and one William W. Babcock, jointly. There were two sales—one of 200 bales, and one of 36 bales. Both sales were made at Helena, on the 26th of July 1862. The agreed price was  $14\frac{1}{2}$  cents per pound. The average weight of the bales was 400 pounds.

5. Subsequently the defendant Guthrie delivered 82 bales of the cotton to Alfred Spink, at Memphis, pursuant to the order of a quartermaster of the army. Spink paid Guthrie \$45 per bale for the cotton so delivered. Fourteen bales more of the cotton were taken by a gunboat, to be used, as was alleged, for caulking purposes. The residue, consisting of 140 bales, was shipped by the defendant to the city of New York, and there sold.

6. General Curtis alleged at the time of the seizure and sale of the cotton that his object was to apply the proceeds to the support of the starving negro population in the neighborhood of his camp. A small part of the proceeds were so applied. He received full payment for the cotton at the contract price. He never reported the seizure and sale to the authorities at Washington nor to any other public officer, and died without having accounted for the proceeds to any one.<sup>1</sup>

7. When the defendants bought the cotton it had been for several days at Helena in the military possession of General Curtis. It was in a damaged condition. The navigation of the Mississippi was at that time attended with peril to life and property. Babcock was killed at a landing twenty miles below Memphis, by guerrillas, on the 20th of October 1862. The value of the cotton at the time and place of purchase was  $14\frac{1}{2}$  cents per pound—what the defendant and Babcock paid for it. The whole quantity of the cotton purchased and received by the defendant and Babcock was 94,400 pounds. The legal title and ownership of the cotton at the time of its seizure by General Curtis was in the plaintiff, Coolidge. He was a resident of Arkansas, but was in no wise engaged in the rebellion. All the facts relating to the cotton were known to the defendant and Babcock when they purchased.

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<sup>1</sup> The court doubtless found the facts as they were shown by the evidence or admitted by the counsel for the defendant, but the court says, "no Act of Congress had then been passed" regulating such seizures, and we are advised from another source that General Curtis satisfied the Government that all the moneys which he so received were expended in the public service.—EDS. AM. LAW REG.



Geo. H. Pendleton and Thomas M. Key, for plaintiff.

Sage & Hinkle, for defendant.

Opinion of the court by

SWAYNE, J.—The plaintiff is entitled to recover unless the grounds of defence relied upon by the defendant shall be found sufficient to protect him. If liable, the measure of his liability is the value of the entire amount of the cotton which he received, at 14½ cents per pound, with interest from the 20th day of July 1862, the time of the alleged conversion. If he was then guilty of an illegal and wrongful act touching the cotton, his liability was fixed at that time, and the subsequent delivery to another of 82 bales, upon the order of the quartermaster, and the taking of 14 bales by the gunboat, can have no retroactive operation or in any wise affect the amount for which he must respond. Where property is tortiously taken, every one who receives it and exercises acts of ownership over it is guilty of a conversion and is liable for its full value, without reference to the liabilities of others through whose hands it may also have passed, either before or after the conversion by the defendant: *Williams & Chapin v. Marle*, 11 Wend. 81.

In the eye of the law the order of the quartermaster, and the act of the gunboat, are immaterial facts in the case, and may be laid out of view.

Two defences are relied upon by the defendant Guthrie.

1. That this court has no jurisdiction of the case.
2. That as soon as General Curtis acquired a firm possession of the property, by having it conveyed *infra præsidia*, the title of the plaintiff became *ipso facto* extinguished, and a complete title vested in the United States; and that if the plaintiff have any rights left in respect to the cotton, they must be asserted against the United States, and that he has none which can be enforced against the defendant.

When the transaction occurred the rebellion had risen to the proportions of a civil war, and was fully flagrant. Arkansas was enemy's territory, and all the property there was enemy property. Cotton was an article of foreign and domestic commerce. It was one of the main sinews of the power of the insurgents. They relied upon it for the purchase of arms and other munitions of war, and chiefly to supply them with financial means for the pro-

secution of the strife. Important belligerent rights were conceded to them by the government of the nation. Their soldiers, when captured, were treated as prisoners of war. They were exchanged, and not held for treason. Their vessels when captured were dealt with by our prize courts. Their ports were blockaded, and the blockades proclaimed to neutral powers, and property found on board such vessels, belonging to persons residing in the rebel states, was uniformly held to be confiscable as enemy property. All these things were done as if the war had been a public one with a foreign power: *The Prize Cases*, 2 Black 687; *Mrs. Alexander's Cotton*, 2 Wall. 417; *Mauran v. Insurance Co.*, 6 Id. 1.

No Act of Congress had then been passed which affects the case. No regulations issued by any department of the government prior to that time, relating to the subject, have been brought to our attention. The Acts of August 6th 1861 and of July 17th 1862 have no application.

General Curtis and his army are to be regarded, for the purposes of this case, as if prosecuting hostilities in a foreign country with which the United States were at war, and the case is to be decided upon the principles of law, applicable in that condition of things.

1. In respect to the defence first mentioned, the inquiry arises whether it should not have been presented by a special plea, and whether it can be considered under the general issue.

The question is the same whether a seizure *jure belli* be made upon land or water. The case of *Lecaux v. Eden*, 2 Doug. 594, was of the latter class. The vessel had been restored and the captors condemned in costs and damages by a decree of the prize court. It was held, upon the fullest consideration, that the defence was admissible under the general issue. The grounds of the judgment were that the capture of the vessel and the imprisonment of the crew were not trespasses by the common law; that, if wrongs had been committed, they were triable only by the law of nations, and that no municipal court had authority to adjudicate upon the subject.

Such was the unanimous judgment of the court. If there were no trespasses by the common law there, *a multo fortiori*, there was by the common law, here, no conversion.

In *Lindo v. Rodney*, 2 Doug. 613, the point of pleading was

not raised, but the same doctrine of the want of jurisdiction in the courts of common law was affirmed by Lord MANSFIELD in a learned and elaborate judgment.

In *Elphinstone v. Bedreechund*, the seizure was by military force on land. A judgment had been rendered by the Supreme Court of Bombay, from which an appeal was taken. Lord TENTERDEN, delivering the opinion of the Privy Council, said:—

“We think the character of the transaction was that of a hostile seizure made, if not *flagrante*, yet *nondum cessante bello*—regard being had both to the time, the place, and the person, and consequently that the municipal court had no jurisdiction to adjudge upon the subject; but that if anything was done amiss, recourse could only be had to the government for redress. We shall, therefore recommend it to his majesty to reverse the judgment:” 1 Knapp P. C. R. 300.

“It should also be observed that according to the English law—which, in this respect, is in accordance with the principles of general law and public jurisprudence—no action can be maintained in a court of municipal law against the captor of booty or prize. If an English naval commander seizes property as belonging to the enemy, which turns out clearly to be British property, he forfeits his prize in the Court of Admiralty, and that court awards the return of it to the party from whom it was taken; but the case of *Lecaux v. Eden* decided the question that no British subject can maintain an action against the captor. \* \* \* \* In like manner, property taken under color of military authority falls under the same rule. If property be taken by an officer under the supposition that it is the property of an enemy, whether of a state or of an individual, which ought to be confiscated, no municipal court can judge of the propriety or impropriety of the seizure. It can be judged only by the authority delegated by the Crown:” 3 Phil. International Law 192, § 130.

See also *Alexander v. The Duke of Wellington*, 2 Russ. & M. 54; *The Army of the Deccan*, 2 Knapp's P. C. R. 106; *Nichol v. Goodall*, 10 Ves. 156; *Hill v. Reardon*, 2 Sim. & S. 431; *Duckwork v. Tucker*, 2 Taunt. 2, 7; 1 Chit. Gen. Pract. 2, 18, notes; *Porte v. U. S.*, Devereux (Ct. of Claims) 171. These authorities are decisive upon the subject. If the action would not lie against General Curtis, obviously it will not against his vendee. The principal fact and the incident which followed are governed

by the same rule: The case of *The Admiralty*, 13 Co. 53; *Anonymous*, Cro. Eliz. 685; *King v. Broom*, Carth. 398; *Turner & Cary v. Neele*, 1 Lev. 243; *Ridley v. Eggesfield*, 2 Id. 25.

It was competent for Congress to give the jurisdiction; but it has not seen proper to do so: Const. U. S., Art. 1, § 8. We hold this objection to the plaintiff's right to recover well taken. This conclusion does not conflict with the ruling of the Supreme Court in *Mitchell v. Harmony*, 13 How. 115. There the property in question belonged to a citizen, and not to an enemy.

II. It remains to consider the second proposition relied upon by the defendant. Chancellor KENT says:—

“In a land war, movable property, after it has been in the complete possession of the enemy twenty-four hours (and which goes by the name of booty, and not prize), becomes absolutely his without any right of postliminy, in favor of the original owner; and much more ought this species of property to be protected from the rule of postliminy, when it has not only passed into the complete possession of the enemy, but been *bond fide* transferred to a neutral:” 1 Kent's Com. 120, last ed.

“The title to property lawfully taken in war may, upon general principles, be considered as immediately divested from the original owner, and transferred to the captor.” \* \* \* “As to personal property, or movables, the title is, in general, considered as lost to the former proprietors as soon as the enemy has acquired a firm possession, which, as a general rule, is considered as taking place after the lapse of twenty-four hours, or after the booty has been carried to a place of safety *infra præsidia* of the captor:” Lawrence's Wheat. 629.

“If the hostile power has an interest in the property, which is available to him for purposes of war, that fact makes it, *primâ facie*, a subject of capture. The enemy has such an interest in all convertible and mercantile property within his control, or belonging to persons who are living under his control, whether it be on land or at sea, for it is a subject of taxation, contribution, and confiscation:” Dana's Wheat. § 256, n. 171.

Vattel says: “We have a right to deprive our enemy of his possessions of every kind which may augment his power and enable him to make war.”

“Whenever we have an opportunity, we seize on the enemy's property and convert it to our own use; and thus, besides

diminishing the enemy's power we augment our own, and obtain at least a partial indemnification or equivalent, either for what constitutes the subject of the war, or for the expenses and losses incurred in its prosecution. In a word, we do ourselves justice."

\* \* \* "As the towns and lands taken from the enemy are called *conquests*, all movable property taken from him comes under the denomination of *booty*. This *booty* naturally belongs to the sovereign prosecuting the war, no less than the *conquests*; for he alone has such claims against the hostile nation as warrant him to seize on such property and convert it to his own use. His soldiers, and even his auxiliaries, are only instruments, which he employs in asserting his right. He maintains and pays them. Whatever they do is in his name and for him:" Vat. Law Nat. pp. 364, 365, Book 3, chap. 9.

It is usual to allow those making the capture to appropriate more or less of the property to their own use; but the paramount right and title are nevertheless in the sovereign, who may assert them whenever it is deemed proper.

Congress, in passing the Act of March 12th 1863, in relation to "captured and abandoned property," proceeded upon this ground.

The doctrines thus laid down are in accordance with those of all approved publicists. (See the authorities cited by the authors from whom we have quoted.)

There can be no doubt that the facts, as found, bring this case within these authorities. The commanding general caused the cotton to be seized and brought within his lines. He had a firm possession of it there for more than the requisite time. There is no question as to the right of postliminy. The possession by both the general and the purchaser was unchallenged by the enemy. The purchaser conveyed the property to New York, and there sold it.

Under the law arising upon these facts there can be but one result.

We hold the second objection fatal, also, to the right of the plaintiff to recover in this action. If he has any right which can be recognised, it is against the Government, and must be asserted elsewhere.

Judgment must be entered for the defendant, with costs.

*Supreme Court of New York,—Broome General Term.*

SAMUEL FREEMAN v. JULIA ANN FREEMAN AND JAMES W. FREEMAN.

Where A. makes a parol gift of land to B. and wife as long as they live, and the latter move on the land with the assistance of A., pay part of the taxes, make valuable improvements and continue to reside on it for six years, the gift will be treated in equity as in the nature of a contract executed, and A. will not be allowed to recover possession of the land during the life of B. or his wife.

If B. should abandon the land and either directly or by neglecting to appear and defend, connive with A. to eject the wife, the latter will nevertheless be entitled to a judgment in her favor for her own life.

THIS action was brought to recover the possession of about 45 acres of land situated in the town of Taylor, in the county of Courtland. It was tried before a referee. Upon his decision judgment was entered and docketed in Courtland county in favor of the plaintiff. The defendant, Julia Ann Freeman, who alone defended the action, has appealed from the judgment to the general term of this court.

*Waters & Waters*, for plaintiff.

*Miner & Kern*, for defendant Julia Ann Freeman.

BALCOM, P. J.—The conclusions of fact, found by the referee, are as favorable to the defendant, Julia Ann Freeman, as are necessary to present the question as to the correctness of his conclusion of law, that the plaintiff was entitled to recover the possession of the land in dispute, notwithstanding the facts. The answer, so far as the facts are concerned, is substantially sustained by the conclusions of fact found by the referee.

The plaintiff purchased the land and paid \$700 therefor on the 7th day of February 1860. He immediately wrote to the defendants, who were then residing in the town of Smithville, in the county of Chenango, as follows: "February 1860. James and Julia Freeman; I have just succeeded in buying a small place for you. There is a small but comfortable log-house and barn on it. You can get a good living on it after a few years. It is for you and yours as long as you live, or as long as you have a mind to stay on it. It is about half a mile from school. I shall be down

with teams to move you on to it as soon as the going will permit. SAMUEL FREEMAN."

Before the end of February 1860, the defendants and their children, in pursuance of a parol gift of the land by the plaintiff to the defendants, went into possession of the same and occupied the same to the time of the trial of this action in March 1867.

When the defendants took possession of the land, only about 3 acres of it had been cleared. They cleared about 12 or 15 acres more of the land and fenced the same, and they also built an addition to the house on the land, being assisted more or less each year by the plaintiff who resided not a great way off. The defendants paid a portion of the taxes on the land during their occupancy of the same.

The evidence, aside from the plaintiff's letter, clearly sustains the conclusion of the referee, that the plaintiff gave by parol the land to the defendants and the use thereof so long as they or either of them should live.

The plaintiff is the father of the defendant James W. Freeman. For some cause, not explained by the evidence, James W. Freeman left his wife and the land and went to live with the plaintiff, his father, the last of April 1866, and did not thereafter return to the land or live with his wife, the defendant Julia Ann Freeman.

James W. Freeman has not defended the action; and it is probable (though there is no finding of the referee on the question), he connived with the plaintiff to turn his wife and children, who remained on the land, out of the possession thereof. But as the gift of the land was to the defendants, husband and wife, jointly, James W. Freeman, the husband, could not do any act that would deprive his wife of her rights, if she has any, by reason of the gift and what she and her husband did upon the land.

The plaintiff sent his team after the defendants, when they moved from Smithville upon the land in question, on the 16th day of February 1860.

It is fair to infer from the evidence that all the plaintiff did upon the land after the defendants went into possession of the same, was prompted by the love and affection he had for the defendants and their children, and that he was actuated by the same motive when he paid portions of the taxes on the land. According to his letter to the defendants, he did not think they could get

a living on the land for the first few years after they should take possession of the same. It undoubtedly was for that reason that he assisted them after they took possession of the land.

It is hardly necessary to refer to the well-settled principle that, in equity, part performance takes a parol agreement for the sale of real estate out of the operation of the Statute of Frauds. (See *Mallins v. Brown*, 4 Comstock 403.) According to our statutes nothing in them "shall be construed to abridge the powers of courts of equity, to compel the specific performance of agreements in cases of part performance of such agreements:" 2 R. S. 135, § 10.

Whether a gift of land may be so far executed as to entitle the donee to a specific performance of it by the donor, is the question to be determined in this case.

In the case of *The Lessee of Syler and Wife v. Eckhart*, 1 Binn. 378, TILGHMAN, C. J., in delivering the opinion of the court, says: "It has been settled that where a parol agreement is clearly proved, in consequence of which one of the parties has taken possession and made valuable improvements, such agreement shall be carried into effect. We see no material difference between a sale and a gift; because it certainly would be fraudulent conduct in a parent to make a gift which he knew to be void, and thus entice his child into a great expenditure of money and labor, of which he meant to reap the benefit himself." And it was held in that case, that a parol gift of lands by a father to his son, accompanied with possession, and followed by the son's making improvements on the land, is valid, notwithstanding the act of frauds and perjuries.

Judge BLACK charged the jury, in *Hughes v. Walker*, 12 Penn. State Rep. 173, as follows, to wit: "Where a man makes a parol sale and receives the purchase-money, he cannot set up the Statute of Frauds against the validity of the contract. So, where he makes a gift by parol, either to his son or to a stranger, if the donee has gone into possession in pursuance of the gift, and made valuable improvements on it, the land so given cannot be claimed back again, and the possession resumed by the donor." The judgment in that case was affirmed. And COULTER, J., in delivering the opinion of the court, said, in respect to the charge of Judge BLACK to the jury: "I will let the charge speak for itself. It will carry itself through."



The principles laid down in the above two cases have never been departed from by the courts of Pennsylvania, but have been sustained and reiterated in other cases. (See *Mahon v. Baker*, 2 Casey 519.)

The following cases sustain to some extent the proposition that the acceptance of the land in dispute, as a gift by the defendants, and their occupancy of it, and their improvements on it, pursuant to the gift, with the approbation of the plaintiff, render the gift irrevocable: *King's Heirs v. Thompson*, 9 Peters 205; *Pope v. Henry*, 24 Vermont Rep. 560; *Dugan v. Gittings*, 3 Gill 138.

The gift was executed by the parties, except that no deed was executed by the plaintiff and delivered to the defendants, so as to show that the defendants had a freehold estate in the land.

I am of the opinion we ought to hold that the gift partook of the nature of a contract and became binding upon the plaintiff in the nature of a contract, by a good and valuable consideration that moved from the defendants, by their changing their place of residence and spending six years of their lives upon the land when it yielded very little, and by their making valuable improvements upon the land and paying taxes thereon. It is not improbable that the defendants, within the time they occupied the land in dispute, might, if they had lived elsewhere, have earned and saved property of greater value than this land. Had the defendant, James W. Freeman, remained on the land with his wife, it would have been unjust and tantamount to a fraud for the plaintiff to have turned the defendants out of possession. And is it not more unjust and more like fraud for the plaintiff, with the consent, if not connivance, of James W. Freeman, to turn the wife of the latter out of possession of the land?

It seems to me the conduct of the plaintiff towards the defendant, Julia Ann Freeman, should be characterized as fraudulent, and be held fraudulent.

The gift of the land to the defendants was a direct encouragement to them to spend their lives upon it, labor on it, improve it, and expend money upon it; and it would be against conscience to allow the plaintiff to revoke the gift. And I am of the opinion the gift should be specifically enforced, on the ground that it has become irrevocable, and valid as a contract, by reason of the consideration that has moved from the defendants, in consequence of the gift, which consideration they could recover of the plaintiff

if its value could be ascertained or estimated in dollars. (See *Rhodes v. Rhodes*, 3 Sand. Ch. Reps. 279.)

The case is one in which justice cannot be done without holding the gift of the land to the defendants irrevocable, and enforcing it in favor of the defendant, Julia Ann Freeman.

The plaintiff's counsel relies on the case of *McCray v. McCray*, 30 Barb. 633, to sustain the decision of the referee. In that case a new trial was granted on the ground that the defendant had offered to prove a parol contract for the land in dispute and part performance of it, which was improperly rejected. The question whether the defendant could have held the land in dispute, in that case, by a parol gift, was not decided; and it was not necessary to determine that question, for there was a contract that controlled the decision.

I am aware that the general rule is, that a gift, strictly speaking, is not regarded in the light of a contract, because it is voluntary, and without consideration. And yet every gift which is made perfect by delivery is an executed contract; for it is founded on the mutual consent of the parties, in reference to a right or interest passing between them. (See 2 Kent's Com. 9th ed., p. 574.)

It is no innovation to hold that the gift of the land in this case partook of the nature of a contract, and became binding upon the plaintiff as a contract, when the consideration, in consequence of the gift, passed from the defendants. And it was not necessary that the plaintiff should be benefited by the consideration. It must be deemed to have passed from the defendants at the instance and request of the plaintiff. He solicited them to take the land, and move on to it, occupy it, and improve it, at a loss to them, for they could not get a living on it. He assisted them in moving upon it; and although he was prompted to do so by the love and affection he had for the defendants, he must be held responsible for the situation in which the defendants were at the time he undertook to turn them out of the possession of the land.

My conclusion is that the defendants were, in equity, entitled to a life estate in the land in dispute at the time the action was commenced; and that the referee should have found, as a conclusion of law, that the defendant, Julia Ann Freeman, was entitled to a judgment in her favor; and entitled to a deed conveying to her and her husband the land in dispute, to have and to hold the

same so long as they or either of them should live. (See *Lobdell v. Lobdell*, 33 How. Pr. Reps. 347.)

Judgment should be reversed, and a new trial granted.

BOARDMAN, PARKER, and MURRAY, JJ., concurred.

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*United States District Court, Eastern District of Pennsylvania.*

BENNETT'S CASE.

ERBEN'S CASE.

Under the provision of the 14th section of the Bankrupt Law of 2d March 1867, excepting from the operation of the act the property of debtors exempted from levy and sale by the laws of the state, a vested expectant interest of a bankrupt in a sum of money payable at his own death, or at the death of another person, may, in Pennsylvania, be set apart for the use of the bankrupt; so, however, that its appraised present value, estimated as in cases of life insurance, does not exceed \$300, or that the bankrupt does not receive more than \$300, if the value thus estimated exceeds that amount.

In *Bennett's Case*, the bankrupt was one of the children of an intestate, whose land having been sold under proceedings in the Orphans' Court of the proper county of the state, a third of the money produced was invested so as to secure to the intestate's widow the receipt of the interest for her life, and to his children the receipt, in equal shares, of the capital at her death. The widow was living when the inventory and appraisement of the bankrupt's effects were made, and at the date of the allotment of what was set apart for his own use under the provisions of the 14th section of the Act of Congress. His expectant vested interest in the share of the capital payable at her death, was appraised at its present value, estimated as in cases of life insurance. The valuation was of less amount than \$300. The bankrupt claimed, and the assignee set apart for him, this item of the estate, as excepted from the operation of the proceedings in bankruptcy, by the 14th section of the Act of Congress of 2d March 1867, under the head of property "exempted from levy and sale upon execution or other process or order of court by the laws of the state \* \* \* to an amount not exceeding that allowed by those laws in force in 1864."

In *Erben's Case*, the bankrupt had effected an insurance on his

own life in a sum of money payable at his death to his wife. It was alleged that he had been solvent when the insurance was effected, and that it formed no part of his estate. But he had paid the annual premiums after his insolvency. This insurance had been appraised as part of the assigned estate; and had afterwards been claimed and set apart for the use of himself as exempt under the provisions of the Act of Congress, and those laws of the state upon which the question arose in *Bennett's Case*.

Upon the hearing of these cases in the Court of Bankruptcy, CADWALADER, J., said that in the case of a similar expectant interest in corporeal property, which interest could be levied on and sold under an execution, he would have had no doubt of the applicability of the exemption laws of the state. But the expectant interests here in question could not be sold under an execution. They could not be reached by a creditor in a court of the state, otherwise than by way of attachment execution—a proceeding under which there could be no sale, in the strict sense of the word. In each case, the question of exemption depended, under the Act of Congress, altogether upon the effect of legislation of the state, or depended upon a meaning of words, which was to be determined according to the effect attributable to them by the courts of the state under such legislation.

He therefore asked the assistance of two judges of the courts of the state, Judge STRONG, of the Supreme Court, and Judge HARE, President of the District Court for the City of Philadelphia.

Judges STRONG and HARE sat accordingly as assessors; and heard the questions argued by counsel on 16th September 1868.

*I. S. Sharp*, for Erben.

*Dawes*, for Bennett.

*Bispham*, contra.

Judges STRONG and HARE, on the 18th of September 1868, expressed their concurrent opinion that the expectant interests in the money payable at the respective deaths of Mrs. Bennett and Mr. Erben, were included in the meaning of the words "property exempted from levy and sale upon execution or other process or order of the court by the laws of the state," and would be ex-

empted under these laws to an amount not exceeding \$300 in each case.

CADWALADER, D. J.—The opinion of the learned assessors appears from proceedings of the registers, and of assignees who were lawyers, to coincide with prevalent views of members of the legal profession in the state. I fully concur. In these cases, therefore, the respective exemptions are sustained.

In *Erben's Case* several questions present themselves for consideration, one only of which, by the suggestion of CADWALADER, J., was argued before and decided by the judges. These questions are as follows:—

1st. Was the policy in question the property of *Mr.* or *Mrs.* Erben?

2d. Supposing it to have been *Mr.* Erben's, was it not exempt under the Bankrupt Act by virtue of the Acts of Assembly of Pennsylvania of 9th April 1849 or of 8th April 1859?

3d. If not exempt by virtue of either of these acts was it not exempt by the Act of April 15th 1868?

1st. It is conceded that at the time the policy was taken out *Mr.* Erben was solvent and so continued for about nine years, during which time he paid all the premiums falling due. (After that time he paid part of them only; the remainder being paid by *Mrs.* Erben out of money given to her by friends.) That a man may convey property to his wife whilst he is solvent, provided there is no intention on his part to defraud his creditors, may be considered as settled in many of the states; and by the decisions of the Supreme Court of the United States it is valid, at least, as to subsequent creditors. See *Story's Eq. Jur.* §§ 359 (n.), 428; *Posten v. Posten*, 4 Whart. 27; *Saxten v. Wheaton*, 8 Wheaton 247.

But this being admitted it is not the province of the court, but of the jury, to say whether there is a fraudulent in-

tent: *Chambers v. Spencer*, 5 Watts 404, 409.

And this was probably one of the reasons why the court refused to hear argument upon the point until the second question had been disposed of. If the policy, however, once became vested in *Mrs.* Erben it could hardly be contended that the payment of some of the premiums by *Mr.* Erben, after his insolvency, divested her interest and rested it in him. There may have been a right of action by *Mr.* Erben's assignee against *Mrs.* Erben for money paid to her use; and in a judgment obtained against her, perhaps, her interest in the policy could be attached: *Girard Fire Ins. Co. v. Fields*, 9 Wright 129; *Mills v. Auriol*, 1 Smith's Lead. Cases 910; *Godsall v. Boldero*, 2 Id. 292; *Dalby v. Ins. Co.*, Id. 297.

2d. Was the policy excepted from the operation of the 14th section of the Bankrupt Act, which gives to the assignee the property and rights of the bankrupt, but excepts from the operation of this section the "household and kitchen furniture \* \* \* and such other property \* \* \* as is exempt from levy and sale upon execution or other process, or order of any court, by the laws of the state in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy to an amount not exceeding that allowed by such state exemption laws in force in the year 1864." The Act of Assembly of Pennsylvania of April 9th

1849 provides "that \* \* \* property to the value of \$300 \* \* \* of any debtor shall be exempt from levy and sale on execution or by distress for rent." The act then goes on to provide a manner of appraising the property which the "debtor may elect to retain." The early decisions of the Supreme Court upon the construction of the term "property" in this act were very strict, and declared "money," among other things, not to be included within it: *Hammer v. Frees*, 7 Harris 255 (1852); *Knabb v. Drake*, 11 Id. 489 (1854).

It was also said that nothing would come within the terms of the law that did not require or was not susceptible of appraisal; it being required that the whole law should be construed together. In 1857, however, the court held that, "Where the real estate of a debtor is seized and sold under a judgment obtained on a mortgage given for the balance of the purchase-money of such real estate, and before the sale the debtor notifies the sheriff that he claims the benefit of the Exemption Law of 1849, and desires to have an appraisal made, such debtor is entitled to the balance of the proceeds after the payment of the mortgage-debt and costs, it not exceeding \$300, in preference to judgments obtained for debts contracted since July 4th 1849 (the law having provided that no debts contracted prior to that date should be affected by the act). ARMSTRONG, J., remarked, in the opinion of the court delivered by him, that the law "should receive a construction favorable to the benevolent object of its enactment," that being "not only for the benefit of the debtor but for his family:" *Hill v. Johnson & Park*, 5 Casey 362.

BLACK, C. J. (in 1852) had said it should be strictly construed because, among other reasons, it was in derogation of the common-law rights of the creditor to take his debtor's property for

his claim. On April 14th 1851, the "Widows' Act" was approved, whose language and general purpose was the same as that of the Act of 1849; and in 1860 the Supreme Court held that under that act "the widow of a decedent may elect to take \$300 as against the creditors of her husband, out of any money or evidence of debt belonging to the estate; and in such case there is no necessity for an appraisement:" *Larrison's Appeal*, 12 Casey 130.

It may be noticed, however, that the widow in this case chose promissory notes, and after selecting them the money for which they called was paid to the executors. But the evident liberal tendency of the Supreme Court in construing the law of 1849 seemed insufficient to satisfy the legislature, the early decisions not being yet overruled, and they therefore passed the Act of 8th April 1859, which extended to the class of persons named in the Acts of 1849 and 1851, the right to exempt "bank notes, money, stocks, judgments, or other indebtedness to such person." The question then was, in this case, whether the term "property," in the Act of 1849, or the term "indebtedness," in the Act of 1859, included a policy of life insurance.

The court have not given the reasons upon which they decided it to be "property," but it can hardly be doubted that the liberal tendency of the Supreme Court in its late decisions in construing those acts and the evident liberal intent of the legislature, as showed in the Act of 1859, induced them to so extend the term. It has been said that "property" in a will includes every species of property, is a *nomen generalissimum*, "and comprehends all earthly possessions:" *Rosetter v. Simmons*, 6 S. & R. 455.

Although this would be a very comprehensive definition to give the term in the statute in question, it yet shows how comprehensive a term it may be held to be where the intent is manifested by

concurrent circumstances. It was contended upon argument, also, that the policy was an "indebtedness" within the meaning of the Act of 1859—a *debitum in presenti solvendum in futuro*. It has been held in England that a life policy will pass under a *will* by the term "debentures and debts:" *Lloyd & Gould, Cases temp. Sugden* 289-294; *Reynolds on Life Insurance* 173. And although the Chancellor said he did not wish to be considered as deciding the "abstract point" that a life policy is a "debt," the reasoning is very strong in support of this view.

Many definitions of "debts," too, may be found in the books sufficiently comprehensive to cover a life policy. See *Bouvier's Dictionary, Debt*; *Gray v. Bennett*, 3 Met. 522, 526; 1 *Bell Appeal Cases* 295.

And the text-books on insurance and on bankrupt law speak of policies of life insurance continually as "debts" and "contingent debts:" *Shaw's Ellis on Insurance* 299; *Cooke's Bankrupt Laws* 190.

As was suggested above, it is believed, too, that it would be the subject of an attachment execution: *Lancaster Bank v. Stouffer*, 10 Barr 398; *Girard Fire Ins. Co. v. Fields*, 9 Wright 129; *Mahon v. Kunkle*, 14 Id. 216; *Mills v. Aurioi*, 1 Smith's Lead. Cases 910.

If this be true, it is a strong circumstance in favor of its exemption as it would seem to be brought within the clause "exempt from levy and sale on execution," which was at first said to be necessary, though the late decisions are less strict. But a very important point upon the general subject is whether it is not exempted by the Act of 15th April 1868, which provides that "all

policies of life insurance or annuities upon the life of any person which may hereafter mature and which have been or shall be taken out for the benefit of, or *bond fide* assigned to the wife of such person \* \* \* shall be vested in such wife \* \* \* full and clear from all claims of the creditors of such person." If, therefore, the *value* of the policy taken out by a husband for the benefit of his wife does not exceed the "amount" which was exempted by the state laws in force in "1864," it would seem that it might be exempted under this later act; even if the title to the policy were vested in the husband at the time he was declared bankrupt. In other words, the state laws exempting property from levy and sale, may be changed with reference to the *articles* exempted if no change is made with reference to the *money value* of the exemption. The difficulty in *Mr. Erben's* case with reference to this point was, that the Act of 15th April 1868, had been passed *after* he had been declared bankrupt and the title to the policy, if in him at that time, might be considered as at once vested in his assignee so that no subsequent act of the legislature could take it out of him; for the Bankrupt Act provides "That the foregoing exceptions shall operate as a limitation upon the conveyance of the property of the bankrupt to the assignee; and in no case shall the property hereby excepted pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this act." If the title *had* vested in the assignee, therefore, it would require a *very* liberal construction to hold that it might be taken out of him by a subsequent act of the legislature.

I. S. S.

*United States District Court.—District of Oregon.*MATTER OF ROBERT SUTHERLAND, A BANKRUPT.<sup>1</sup>

A judgment for a fine imposed as a penalty for crime is not a debt within the meaning of the Bankrupt Act, and not being included in the special provisions allowing certain claims to be proved as debts, it cannot be proved against the estate of a bankrupt.

THE state of Oregon proved a debt against the estate of the bankrupt, amounting to \$1394.46. Upon the motion of the assignee, the claim was set down for examination before the court.

From the evidence and admissions of the counsel for the state and assignee, it appeared that on December 3d and 4th 1861, two several judgments were given in the Circuit Court of the state for the county of Multnomah, sentencing the bankrupt to pay two certain fines, and that he be committed until the same be paid. The debt proved before the register is a part of the sum for which these judgments were given, the remainder having been paid.

## Opinion by

DEADY, J.—It is understood from the admission of the counsel that these fines were imposed upon the bankrupt as a punishment prescribed by law for the commission of a crime, of which he had been duly convicted. Indeed, a judgment that a party pay a fine, in the absence of anything to the contrary, must be presumed to have been given as a punishment for the commission of a crime.

The State Act of January 25th 1854, in force when these judgments were given, provides that "any convict" confined in jail "for the non-payment of a fine," may be discharged from such imprisonment by the commissioners of the county, if he is unable to pay the fine; "but such convict shall not thereby be released from the payment of such fine, but the same may be collected by execution at any future time." Under this act the bankrupt was discharged from imprisonment soon after the judgments were given.

Section 19 of the act declares that all *debts* due and payable from the bankrupt at the time of the adjudication of bankruptcy \* \* \* may be proved against the estate of the bankrupt. Does the term *debt* include a judgment for a fine? Blackstone (vol. 3,

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<sup>1</sup> We are indebted for this case to the courtesy of Hon. M. P. DEADY.—EDS.  
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154) says, "the legal acceptance of *debt* is, a sum of money due by certain and express agreement." This, however, is not the popular acceptance of the word. Says the Supreme Court of Massachusetts (3 Met. 526): "The word debt is of large import, including not only debts of record, or judgments, and debts of specialty, but also obligations under simple contracts to a very wide extent; and in its popular sense includes all that is due to a man under any form of obligation or promise." This view of the subject was approved by Justice Story (2 Story's R. 432).

To ascertain, then, whether the word debt is here used in the legal or popular sense, recourse must be had to the subject-matter and the context. Immediately following the general clause of section 19, concerning debts, as above quoted, it is provided that, "All demands against the bankrupt for or account of any goods or chattels wrongfully taken, converted, or withheld by him may be proved or allowed *as* debts, to the amount of the value of the property so taken or withheld, with interest." The section then proceeds to provide for the case of contingent debts and liabilities, as well as unliquidated damages upon a contract or promise, and then concludes: "No debts other than those above specified shall be proved or allowed against the estate."

From all the provisions of the section, it is apparent that the word debt is used in the legal or limited sense. If it were used in the popular sense, it would not have been necessary to have specially provided that "demands for goods wrongfully taken, &c., may be proved or allowed *as* debts." In the popular sense, such demands are debts, and would have been included in the preceding clause providing for the proving "all debts."

A discharge in bankruptcy releases the bankrupt from all debts which were or might have been proved against his estate: Sect. 34 Bankrupt Act. These fines were imposed upon the bankrupt as a punishment for crimes of which he was convicted. If provable against his estate, he may be discharged from the payment of them and from arrest made to enforce such payment.

In effect, this would be allowing the National Government, through its courts, to grant pardons for crimes committed against the state. A person convicted of manslaughter and sentenced to pay a fine of a thousand dollars, would be relieved, by a discharge in bankruptcy, from the punishment affixed by law to his crime. I do not think that the act, while it reasonably admits of any other

construction, ought to be construed so as to permit or allow such a consequence.

Looking at the letter of the act or the nature of the subject, either separately or conjunctively, it appears to me that a judgment for a fine, imposed as a punishment for a crime, is not a debt provable against the estate of the bankrupt. Abstractly considered, it may be proper that such a judgment should be proved as a debt against the estate for the purpose of receiving any dividend as a part payment thereof, without effecting a full discharge of the same. Such a provision is found in section 33, concerning debts created by fraud or embezzlement, or by defalcation, while acting as a public officer, or in fiduciary character. But judgments for fines are not included in this special provision, because not enumerated in it.

In *The People v. Spalding*, 10 Paige Ch. R. 284, it was decided that a discharge under the Bankrupt Act of 1841 did not discharge a party from a judgment for a fine imposed upon him as a punishment for a contempt, committed by violating an injunction. The contempt was merely constructive, and the fine imposed was directed by statute to be ultimately applied in satisfaction of the civil injury to the party who obtained the injunction. The Court of Errors affirmed the decision: 7 Hill 301. On error to the Supreme Court of the United States, the judgment of the Court of Errors was affirmed: 4 How. 21.

This case seems decisive of the question. Indeed, it goes much further than the court is required to go in this case. The Bankrupt Act of 1841, in the use of the word *debt*, is much less qualified than the present one, yet the court held that it did not include a judgment for a fine. In the case under consideration, the fine was imposed purely as a punishment for the commission of an actual crime; while in the case cited, the fine was imposed, nominally as a punishment, but in reality as a compensation to the creditor for the civil injury he sustained by reason of the commission of the acts constituting the contempt.

The claim must be expunged from the list of debts proved against the estate of the bankrupt.

*United States District Court.—District of North Carolina.*MATTER OF ALVIN G. THORNTON, BANKRUPT.<sup>1</sup>

Real estate cannot be allotted or set apart by the assignee to a bankrupt under section 14 of the Bankrupt Act, even though the personal property, excluding the articles exempted by the state law, be less than the amount which the assignee thinks should be allowed the defendant.

Money may be so allotted to the bankrupt.

THE following question was certified by the Register:—

Should an assignee in bankruptcy, in case there is a deficiency of *personal property*, allot to the bankrupt an exemption in *real estate* under section 14 of the Bankrupt Act of 1867—in other words, does the Bankrupt Act give to an assignee the discretionary power of assigning to the bankrupt real estate to make up deficiency when he (the assignee) is of opinion that the bankrupt's exemption under said section 14 ought to amount to \$500, and there is not that amount of personal property belonging to the estate over and above the articles specifically exempted under sections 7 and 8, chapter 45, Revised Code of North Carolina?

*John W. Hinsdale*, for creditor.—I. The term *necessaries* is used principally in the laws relating to infants and *femes covert*. It is always defined as *personalty*, and never including real estate: Smith on Contracts 216 and note reference to *Tupper v. Caldwell*, 13 Metcalf 563.

An infant can contract for necessities; but, however necessary land might be to him, its purchase by him would not be binding; so in case of *feme covert*, who might be in the greatest need of a home—a sale of house and lot to her would not bind her husband: *Freeman v. Bridgers*, 4 Jones N. C. Law, p. 1; *Seaton v. Benedict*, 2 Smith's Lead. Cas. p. 431; Tyler on Infancy and Coverture 105, 112, 117, 120, 356, 358.

II. This is the proper time to take exceptions, and solicit the opinion of the court: Bankrupt Act, § 14, Gen. Clause 50 (Rice's Manual); Gen. Orders in Bankruptcy, Rule XIX.

*B. & T. C. Fuller*, for bankrupt.

BROOKS, J.—I have examined with care the authorities cited

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<sup>1</sup> We are indebted for this case to J. W. Hinsdale, Esq., counsel.—EDS. AM. LAW REG.

by the counsel representing the creditors who except to the report of the assignee. And I have also read with interest the argument filed by the attorneys for the bankrupt.

This question has often arisen, and given rise to animated discussion in my presence, but is now for the first time presented under the provisions of the law for my decision. I am well satisfied that a fair and proper construction of the language used in that part of the Bankruptcy Act, which relates to exempting, as well as the true spirit and object of the law, will not justify or authorize the action of the assignee in this case. The terms "other articles and necessities," as used in the act, cannot be so construed as to embrace land, without doing violence to every meaning heretofore allowed those terms. It is quite clear, I think, that if among the property of the bankrupt none, or not enough, of the articles specifically mentioned in the act to be exempted be found, then the assignee may report as exempted other "articles and necessities" to make up the amount required, or the deficiency (as the case may be) in the opinion of the assignee, the whole not to exceed, under any circumstances, the value of \$500.

The suggestion of the counsel for the bankrupt would have much weight if it was a matter of discretion. But the court can no sooner award an article or kind of property, not properly embraced within the terms used, according to a fair construction, than it could exceed the sum prescribed. The exemptions provided for by the Bankruptcy Act originated from the same spirit that prompted the enactment of our legislative provisions in favor of widows of intestates, awarding these provisions for their temporary support. And as that law restricts the commissioners in the kind or species of property they shall award, so does the Bankruptcy Act restrict the assignee as to the kind of property he shall exempt. Now it often occurs that this all-important purpose of the law would be defeated, if under no circumstances money could be exempted to a bankrupt. Yet, from the language of the law, if money could not be construed to be an article or a necessary, it would be quite clear, I think, that money could not be allowed. But it is as clear that money may be allowed, for it not unfrequently occurs that money is quite as necessary to the temporary subsistence of a bankrupt and his family as any article that can be mentioned.

As the widow of an intestate, upon the granting of administration, is presumed to be entirely destitute of such articles and provisions as are necessary for her support, so the Bankruptcy Act presumes that every man who has been adjudged a bankrupt has sworn truly, and has surrendered all his property and estate. Then, if this be correct, he is alike destitute. Now, suppose the bankrupt has been a merchant, a banker, and has surrendered a large estate in "choses in action" and money, but not having been a housekeeper, but from choice, from motives of economy, or otherwise, he and his family, consisting of a wife and children, have been inmates of a boarding-house—he does not own a bed or a chair, or any article of provisions, consequently there is nothing of the kind in his schedule; surely it could not be successfully contended that some money would not be necessary for the temporary subsistence of such a family. Under such circumstances money may be exempted.

The assignee must advertise the real estate mentioned in his report as exempted, and sell the same to the highest bidder, and apply the proceeds as the law directs.

Let this be certified.

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*United States District Court—District of New Jersey.*

RE ISAAC ROSENFELD, JR.

A., before insolvency and not in contemplation of bankruptcy, indebted to B. in the sum of \$2411, sold to B. an estate to the value of \$10,000, and credited him on his books for the said sum of \$2411 at the time of sale. Afterwards A., when insolvent and in contemplation of bankruptcy, had a settlement with agent of B., when the sum of \$2411 was deducted from the amount of purchase-money. *Held*, that the payment was really made at the time of sale, that it was not an appropriation of payments and that it was a legitimate transaction and not a fraudulent preference within the meaning of the Bankrupt Act. Where specification charges that a particular debt was paid after passage of Bankrupt Act, and the proof shows that it was paid before, and proof is offered that there were other debts not mentioned in specifications that were paid after passage of said act: *Held*, that the creditors are bound by the specification, and such proof is inadmissible.

Servants' wages paid after the passage of Bankrupt Act, as necessary family expenses, cannot be allowed as objection to discharge. Payment made to counsel for services "rendered and to be rendered," by bankrupt without fraud is not a ground for refusal of discharge. Where a bankrupt, insolvent and in contemplation of bankruptcy, insured his life, it is an improper transaction. Insurance

made upon house and furniture in pursuance of covenants in lease is not a fraudulent preference. Expenditures incurred by bankrupt while insolvent in support of family, and the evidence is silent as to their character, the court cannot admit such expenditures as a ground for *refusal of discharge*.

THIS case came before the court upon specifications filed by Marx & Co., creditors of the bankrupt, in opposition to his discharge.

Mr. Rosenfeld was a broker, residing in New Jersey, but doing business in New York; and in May 1866, deemed himself to be worth nearly a quarter of a million of dollars; but in one day, owing to a sudden and expected fluctuation in the price of gold, he became bankrupt. He at once made an assignment of all his property for the benefit of his creditors, except his homestead and furniture in Orange. In the schedule, however, annexed to the assignment, the validity of the claims against his estate, growing out of gold contracts, was denied, and has ever since been disputed by him. Negotiations for an amicable settlement with his creditors were for a long time pending, and were in progress up to within a week of the filing of his petition in bankruptcy.

His counsel, Mr. Maclay, testified that so late as May 28th 1867, he had every reason to believe that such a settlement would be effected. Most of the specifications originally filed related to transactions which took place prior to the passage of the Bankrupt Act. Exceptions were taken to these specifications upon the ground that acts done before the passage of the Bankrupt Law were not a good cause for refusing a discharge. These exceptions were sustained, and new specifications were filed in accordance with the opinion of the court. It is these specifications which are now to be considered.

*Abbett & Fuller*, for petitioner.

*T. N. McCarter* and *Goepp & Stern*, for opposing creditors.

FIELD, J.—1. The first specification relied upon is, That on the 28th of May 1867, being then insolvent and in contemplation of bankruptcy, the bankrupt paid to his uncle, Isaac Rosenfeld, in full, a debt of \$2411.01.

That the bankrupt was insolvent and in contemplation of bankruptcy on the 28th of May 1867, has been clearly shown. If he did, therefore, on that day pay to his uncle this debt of \$2411.01,

I think it would be a "*fraudulent preference*, contrary to the provisions of the act" within the meaning of the 29th section, and a good ground on which to refuse a discharge.

But was this payment in fact made on the 28th of May 1867? The evidence shows that on the 4th of January 1867, the bankrupt sold to his uncle, Isaac Rosenfeld, certain real estate for the sum of \$10,000, and that he was at that time indebted to his uncle in the sum of \$2411. On the 28th of May 1867, a settlement was had between the bankrupt and Moses B. Maclay, Esq., the agent of his uncle, and in that settlement this debt of \$2411 was deducted from the amount of the purchase-money, and the balance paid in cash. Now it is insisted, that inasmuch as "the purchase-money was not appropriated nor disposed of before the 28th of May 1867," therefore this payment of \$2411 must be considered as having been made on that day. But it seems to me there is not the slightest foundation for such an idea. The doctrine of appropriation of payments has no reference to a transaction of this kind. The payment was really made at the time of the purchase of the real estate. From that time, the bankrupt could have had no claim to anything but the balance of the purchase-money after the payment of the debt. When the settlement took place on the 28th of May 1867, it was not for him to say whether this debt should be deducted from the purchase-money or not. He had no power to prevent it. Such would have been the legal effect of the transaction, if nothing had been said or done by either of the parties in relation to it. But the evidence would seem to show, that in point of fact, Isaac Rosenfeld, the purchaser, at the time of the sale, credited the bankrupt on his books with the amount of the purchase-money, and charged him with this debt of \$2411, leaving a balance due to him, which was paid on the 28th of May 1867. It was a legitimate transaction, and I see nothing in it to sustain the charge of a fraudulent preference within the meaning of the Bankrupt Act.

2. The second specification is, that after the passage of the act, being insolvent and knowing himself to be so, and in contemplation of bankruptcy, he paid to W. B. Ticknor & Co., a debt of \$154.30.

The answer to this is, that this specific debt was paid in 1866, and not after the passage of the Bankrupt Act. But it is insisted that there were bills of W. B. Ticknor & Co. paid in May and

June 1867, and that these bills amounted in the aggregate to more than \$154.30, and therefore that the charge contained in the specification has been substantially sustained. That is, the specification charges that a particular debt was paid after the passage of the Bankrupt Act; and when it was shown that this debt was paid in 1866, then proof is offered that there were other debts not mentioned in the specification, that *were* paid after the passage of the act. Such proof is inadmissible. The opposing creditors are bound by their specifications. They cannot go beyond them, or produce evidence outside of them. Where would be the use of specifications if this were not so? Instead of apprising the bankrupt of the specific grounds upon which his discharge was to be opposed, they would only tend to deceive and mislead him.

3. The fifth specification is, that a debt of \$158.44, due to J. C. Harden, was paid after the passage of the Bankrupt Act.

But the evidence shows that this debt too was paid in 1866. And then it is said, there was another debt of \$66.45, that *was* paid March 30th 1867. All that I have said with regard to the second specification, is applicable to this.

4. So too with regard to the sixth and seventh specifications, they charge that certain debts were paid after the passage of the Bankrupt Act, while the evidence is that they were paid in 1866.

5. The eighth specification is, that after the passage of the Bankrupt Act, he paid servants' wages, to the amount of \$1400.

This charge is not sustained by the evidence. The bankrupt testified, both before the register and in court, that this \$1400, mentioned in his schedule as servants' wages, covered a period of about fourteen months: that while it was not the same during the whole time, yet the average amount was something like \$100 a month; and that it was paid from month to month as it fell due. No attempt has been made to discredit his testimony.

It seems, then, that instead of paying \$1400 for servants' wages after the passage of the Bankrupt Act, he paid but \$400. It was paid from month to month as it became due. It was a part of his necessary family expenses.

But it is said Mr. Rosenfeld had no right to pay even \$400 for servants' wages, after the passage of the Bankrupt Act. As he intended to apply for its benefit and avail himself of its provisions, he ought at once to have reduced his establishment, retrenched his expenses, discharged his servants, and adopted an entirely



different style of living from that in which he had previously indulged. Now, if the specific charge had been that the sum of \$400 for servants' wages, for a period of four months, was an extravagant sum for a man situated as Mr. Rosenfeld was, to pay, that it could not be fairly regarded as coming under the head of necessary family expenses, and must be treated as a fraudulent preference, or payment or transfer of property contrary to the provisions of the act, there might have been force and pertinence in these observations. But the specification charges an entirely different thing. It charges that the bankrupt, after the passage of the act, paid \$1400 for servants' wages, that is not only the \$400 which accrued after the 2d of March 1867, but also \$1000 which had accrued prior to that day. Had this charge been true, such a payment might well have been considered a fraudulent preference. This was the charge that the bankrupt was called upon to meet, and no other. He has met it, and has shown that it is entirely unfounded.

6. The ninth and tenth specifications may be classed together. They charge the bankrupt with having paid, after the passage of the act, to Moses B. Maclay, Esq., the sum of \$1000, and to Messrs. Abbett & Fuller the sum of \$1608.77, part of which sums were for past professional services.

The charge contained in these specifications is somewhat vague, it not being stated how much was paid for past and how much for future services. It appears, however, from the evidence, that of the \$1000 paid to Mr. Maclay, \$250 were for past services, and of the \$1608.77 paid to Abbett & Fuller, \$608.77 were for past services. The bankrupt had a right to employ counsel. Their professional services were absolutely necessary for him. It was natural that he should resort to those whom he knew and had formerly employed and in whom he had confidence. And it was natural, that before consenting to act in a case which would necessarily require much time and labor, they should insist upon being paid an amount that would cover both past and future services. Mr. Abbett, in his testimony before the court, stated that before he consented to take charge of the case in bankruptcy, he told Mr. Rosenfeld that he would have to pay him for what he had already done for him, and also the sum of \$1000. And Mr. Maclay says he "charged him \$1000 for services rendered and to be rendered." The bankrupt was obliged to comply with these

demands or forego the services of these gentlemen and employ other counsel. This, no doubt, he might have done, and strictly speaking, he had no right to pay them a debt due for past services. But I see no evidence of fraud upon the part of the bankrupt in these transactions, and I think it would be a harsh construction of the Bankrupt Act to pronounce them fraudulent preferences within the meaning of the 29th section, and on this account alone refuse a discharge. If the strict rule contended for by the counsel of the opposing creditors were to prevail, the payment of a debt, however small, through inadvertence or under a mistaken sense of duty, and without any fraudulent intent whatever, would be sufficient in all cases to deprive a bankrupt of his discharge—I do not believe that the framers of the act ever intended that it should receive so rigid a construction.

7. The 11th specification is, that the bankrupt, on the 1st of June 1867, knowing himself to be insolvent, and in contemplation of bankruptcy, invested \$641, as the premium for one year, on two policies of insurance on his life, taken by him for the benefit of his wife and children.

The facts alleged in this specification are fully proved, and are not disputed. The explanation given by the bankrupt of this transaction is in substance as follows: "On the 22d day of May 1866, he had made an assignment for the benefit of his creditors. In May 1867 he entered into a negotiation with the assignees for the sale of his wife's right of dower in certain real estate included in the assignment. They agreed to give him \$4000 for it, and he determined to invest the money thus obtained in payment of premiums upon a life insurance for the benefit of his wife. Believing that this agreement would be carried out by the assignees, and desirous of having the insurance effected with as little delay as possible, he advanced \$640 of his own money in payment of the premiums, intending to replace it out of the \$4000 as soon as received. He further stated that he had consulted his counsel, Mr. Maclay, in relation to the matter, and understood him to say that there was nothing wrong or improper in the transaction. Mr. Maclay, says, however, that Mr. Rosenfeld must have misapprehended him, and that he gave him no such advice or opinion. It turned out that the \$4000 was never received from the assignees. They refused to consummate the bargain, and allowed the

real estate to be sold subject to the right of dower. But the \$640 had been paid, and Mr. Rosenfeld was unable to replace it.

If this is a correct account of the affair, while I see in it no evidence of fraud on the part of the bankrupt, still I have no hesitation in saying that it was an improper transaction, and one of which the creditors have a right to complain. The bankrupt clearly had no right to withdraw this money from the estate. It belonged to his creditors. His counsel says that this cannot be considered as a fraudulent gift or conveyance of any part of his property. It was a mere *loan* to his wife, with the prospect of having speedily in his own hands the means of repayment. But the answer given to this, by the counsel of the creditors, is a correct one. If it were a loan to his wife to be replaced out of her dower, then she is indebted to the estate to that amount, and the bankrupt ought to have included the claim in his schedule of assets. This, however, I understand the bankrupt virtually admits, and his counsel now consents that the court shall order the schedule to be amended in such a way as to include this \$641 in the assets of the bankrupt. I see no objection to this course being taken, and then there will have been not only no intention on the part of the bankrupt to defraud, but no one in fact will be defrauded.

8. The 12th specification is, the payment of \$118.80 for insurance on the house and furniture at Orange. The answer given to this is, that the payment of the insurance was made in pursuance of a covenant contained in the lease. It was a part of the rent, and if it had not been paid the lease would have been forfeited. The counsel of the creditors suggests, as worthy of remark, that the bankrupt had a term yet unexpired, in this Orange property, which might have been a valuable asset in the hands of the assignee. If this were so, then it was his duty to pay the insurance, and instead of being a fraud upon the creditors, it was for their benefit, for otherwise the lease would have been forfeited, and there would have been no longer an unexpired term to dispose of. This view of the case is not at all altered by what the counsel further suggests, namely, that the bankrupt, by the deed and release, which Mr. Maclay insisted upon his executing, extinguished this term of years, and thereby deprived his creditors of the benefit of it, for such a charge is nowhere contained in

any of the specifications. The payment of this insurance cannot, in any point of view, be deemed a fraudulent preference.

9. The 13th, 14th, and 15th specifications relate to expenditures incurred by the bankrupt from May 22d 1866 to June 22d 1867, embracing a period of thirteen months. They were as follows:—Paid to

Miscellaneous Tradesmen . . . . .	\$3759 41
Grocer . . . . .	691 49
Butcher . . . . .	1159 23
Total . . . . .	<u>\$5610 13</u>

With regard to the amount paid to miscellaneous tradesmen, the specification does not charge, nor is there any evidence to show how much of this was paid prior to the 2d of March, the date of the Bankrupt Act, and how much was paid afterwards. It is true, that the bankrupt on his examination before the Register says, that his probable expenditures during this period of thirteen months was \$655 per month; but this result was arrived at by adding together the whole amount of payments made during this period, and dividing it by the number of months embraced in it. Whether his monthly expenditures were the same after the passage of the Bankrupt Act as they were before, nowhere appears. They may have been very much reduced. The evidence is entirely silent upon this point. I presume it will not be contended that a man had not a right after the passage of the Bankrupt Act to spend money for his necessary family expenses, notwithstanding he contemplated availing himself of its provisions; and how is it possible for me to say, in the absence of all evidence upon the subject, how much of this sum of \$3759.41 was paid after the 2d of March 1867, and whether it was or was not for necessary expenses?

The same remarks apply to the grocer's and the butcher's bills. They both cover a period of about thirteen months, extending from May 1866 to June 1867, and it is not alleged in the specifications, nor is there evidence to show how much of them were paid before the passage of the Bankrupt Act, and how much afterwards. Mr. Harden, the grocer, in his testimony before the court, states that no wines were purchased, but only ordinary groceries, and that they were paid for each week by Mr. Rosenfeld. He also swears that the quantity of groceries purchased of him by

Mr. Rosenfeld, after his failure was from \$20 to \$40 per week less than it had been before.

10. The 16th specification is, that on the 28th of May 1867, the bankrupt, knowing himself to be insolvent and in contemplation of bankruptcy, received from his uncle the balance of the purchase-money for the house in Orange, and appropriated it in part to the payment of preferred creditors, in part to the premium on his life insurance of \$641, and in part to extravagant living.

Now, it will at once be perceived, that this specification is nothing more than a recapitulation of the several charges contained in the other specifications. The only difference between them is, that there they are presented separately, while here they are grouped together.

But inasmuch as these charges, when made separately, have all been considered and disposed of, it will hardly be thought necessary to spend time in the examination of them, when they are thus combined.

I have thus gone over all the specifications relied upon as grounds upon which to oppose the bankrupt's discharge; I have carefully examined all the evidence in connection with them; I have read attentively and duly weighed the elaborate, and I may add, the very able arguments submitted to me by the counsel on both sides, and the conclusion to which I have come is, that the opposing creditors have not succeeded in making out a case, either of "fraudulent preference, or fraudulent payment, gift, transfer, conveyance, or assignment," by the bankrupt of any part of his property, within the meaning of the 29th section of the act.

The only charge upon which, if distinctly presented, I might have felt some doubt and hesitation, is that which relates to the style of living in which the bankrupt indulged, and the kind of establishment which he kept up after the passage of the Bankrupt Act. and after he had determined to apply for the benefit of it. The counsel of the creditors have, in their argument, returned to this subject again and again, and made many just and striking observations in relation to it, and I confess that the impression made upon my mind is, that the family expenses of the bankrupt during the period in question were unnecessarily large—larger than ought to have been incurred by one in his circumstances. But it is only an impression, and a somewhat vague one too, for the evidence furnishes us no means of knowing what these ex-

penses really were. But were it more clear and distinct, I should be unwilling to refuse a discharge to the bankrupt upon any ground not expressly set forth in the specifications. In no one of the specifications filed is this charge distinctly presented. The burden of all the specifications is fraudulent preferences or payments. Nowhere is it alleged that the family expenses paid by the bankrupt after the 2d of March 1867 were not necessary expenses. The only specification in which the subject of "extravagant living" is at all alluded to, is the 16th, which is, as I have said before, a mere recapitulation of former specifications, and evidently not intended to introduce any new charge.

Then, too, we must take into consideration the fact to which I have before adverted, that as late as May 1867 the bankrupt had reason to expect that an arrangement would be made with his creditors, and that it would not be necessary for him to apply for the benefit of the Bankrupt Act. Mr. Maclay expressly says, that up to that time he had been endeavoring to arrange the gold debts of Mr. Rosenfeld, and believed that he would be successful in his efforts to do so. This, perhaps, might, to some extent, have justified the bankrupt in keeping up his establishment, and continuing to live in a way which, under other circumstances, would not have been proper.

On the whole, I am of the opinion that the bankrupt is entitled to his discharge.

## LEGAL NOTES.

**SERVICE OF CIVIL PROCESS. PRIVILEGE OF MEMBERS OF CONGRESS.**—The case of *Charles W. Wooley v. Benjamin F. Butler*, in the Superior Court of Baltimore, was an action for an alleged false imprisonment. The defendant, a Representative from Massachusetts, while passing through the city of Baltimore on his return home from a session of Congress, was served with a writ of summons. At the September Term 1868, defendant moved to quash the writ on the ground that the service was in violation of his privilege as a member of Congress. The case was argued at great length by Hon. Caleb Cushing and William Schley, Esq., for General Butler, and Hon. R. T. Merrick, R. J. Brent and W. M. Addison, Esqs., for plaintiff. For the motion it was argued that the word "arrest," in the Constitution (art. I., sect. 6), includes all civil process, and that by the analogies of the privilege of jurors, witnesses, attorneys, &c., this was the exemption to which the privilege extended. The court, however, DOBBIN, J., was of opinion that the word "arrest," in the Constitution was used in its ordinary

sense, and as the summons in this case involved neither personal detention in the first instance nor liability to attachment for disregarding it subsequently, the motion to quash was refused.

In *Thomas C. Hoppin v. Thomas A. Jenckes*, in the Supreme Court of Rhode Island (February 1868, not yet reported), another question arose on the same subject of privilege. That was an action against defendant as endorser of certain notes, and he filed a plea in abatement setting forth that he was a member of Congress, that Congress had adjourned on the 20th of July, that the writ was served on August 23d, and that he was then engaged as a member of a committee of Congress authorized to sit during the adjournment.

There was no question as to the arrest, but it was claimed that the privilege lasted forty days after the session, in analogy to the privilege of members of Parliament.

The court, however, BRADLEY, C. J., decided, on a very elaborate and careful review of the authorities, both English and American, that it lasted only a *reasonable* or *convenient* time. What is especially to be commended in the opinion is the very thorough *historical* method of examining and construing the clause in the Constitution; a method, we may venture to say, treated rather too cavalierly in the opinion of the Baltimore court. A paragraph in C. J. BRADLEY's opinion expresses our idea so well that we give it in his own words:—

"We have discussed, it may seem, at unnecessary length, the question presented by this plea; but it called for a consideration of the law of England as to the duration of the privilege from arrest of a member of Parliament, and also the consideration of a clause of the Constitution of our country adopted from the parliamentary law of England. *It is not enough in such cases to be content with what may be termed a common sense interpretation* or with a mere dissent from the opinions expressed or implied of such high authority as has been quoted to us. A court must satisfy itself by deeper and more thorough inquiries whether the obvious interpretation, or the one suggested by such learned minds, is the true one."

**USURY BY NATIONAL BANKS.**—In the case of *Malone, Ex'r. of Fall, v. The Heirs and Creditors of Fall*, Chancellor SHACKELFORD, of the Middle District of Tennessee, held that a national bank taking usurious interest on a loan, forfeits the entire debt, principal and interest. The National Bank Act (Act of June 3d 1864, § 30, Brightly's Dig. vol. 2, p. 58) enacts that banks may take such interest as is allowed by the law of the state in which the bank is situated, or in default of any provision in the state law, 7 per cent. may be taken. The section then continues: "And the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid *shall be held and adjudged a forfeiture of the entire interest* which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon." It appears by the opinion that the law of Tennessee merely forfeits in such case the excess of interest over 6 per cent.

The decision, therefore, cannot rest either on the Act of Congress or any effect of the state law of Tennessee, but is based on the argument that the Act of Congress having prescribed a penalty has made the contract itself unlawful, and therefore utterly void, so that the courts can-

not give effect to any part of it. The Chancellor says: "Upon a review of the authorities, I am satisfied that the loan of the money by the Third National Bank was in direct violation of the act creating the bank, and that the contract is void, and that the bank is not entitled to recover the principal and legal interest. The object and purpose of the law was to prevent the taking of usurious interest, and it is the duty of the courts to enforce it."

The fact that Congress has prescribed a penalty for the act complained of, viz., forfeiture of all interest, and that the effect of the decision is to judicially enlarge the prescribed penalty, does not seem to have been urged upon the court.

**NATIONAL BANKS.—TAXATION OF SHARES.**—The Supreme Court of Missouri, in the case of *Lionberger v. Rouse* (October 1868), decides that the shares of stockholders in national banks are taxable under the state law of Missouri of February 4th 1854. The mode of taxing the shares being substantially that prescribed by the Act of Congress, the fact that the Missouri statute was passed before the Act of Congress is unimportant. A more doubtful question, however, was whether the law made any discrimination against the national banks in the rate of tax. By section 41 of the Act of Congress of June 3d 1864 the state may tax shares in national banks, provided the tax "shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state," &c.

By statute of Missouri the state banks, prior to the establishment of the national banks, were subject to a certain rate of tax upon the capital stock paid in, which rate could not be increased. *This rate was less than the tax now in question* assessed upon the national bank shares. In 1863 the Missouri legislature passed an act allowing the state banks to surrender their charters and reorganize under the National Bank Act. All the banks availed themselves of this privilege but two, which still continue under the state law of 1857. The question was whether the taxation of these two banks at a lower rate on the *capital paid in* than the rate levied on *shares* of national banks was a discrimination against the latter, within the prohibition of the Act of Congress. The court held that it was not. "But it is further said, and it is unquestionably the strong argument on this branch of the case, that the tax cannot be sustained, because it is higher than the rate paid by the two state banks (the Exchange and the Mechanics'), existing under the Act of 1857. And to enforce this view, it is contended that they are the only banks in the state within the proper and legal meaning of the term. This is predicated on the hypothesis that an institution is not strictly a bank without it issues or circulates currency. This, I think, is a mistake. In commercial law a bank is regarded as simply a place for the deposit of money. It is an institution, though generally incorporated, yet it need not be, which is authorized to receive deposits of money, to lend money, and when empowered by charter, to issue notes. It may perform one or all of these functions. Banks may be, and are organized under the authority of the state without any power to issue notes of circulation.

"The proviso in the 41st section of the National Banking Act, imposing a limitation on the power of the states, declares that the tax upon the shares of the associations shall not exceed the rate imposed upon



the shares of the banks organized under state authority. No peculiar or particular banks are described, and it is just to infer that Congress did not use the word in any restrictive sense, but left it to include all moneyed associations, savings and banking institutions. There are many of these banks chartered by the state, some of them with capital perhaps exceeding in amount the capital of the banks in issue, and with privileges just as valuable, with the exception of the power to emit paper. They are banks to all intents and purposes, and their shareholders are all taxed at the same prescribed rates as the shareholders in the national associations. There is, then, no discrimination or distinction made between the two classes of shareholders.

"That the two banks which have retained their distinctive state organizations are taxed to a less amount according to their contract, cannot in the least alter the case. They create no repugnance whatever. They are exceptional cases, and not within the rule, spirit, or intention of the Act of Congress. It can never be tolerated, the idea cannot for a moment be entertained, that because two banking institutions choose to rely on their charter and avail themselves of a special privilege guaranteed to them, that therefore Congress ever contemplated that the whole moneyed capital of the state should be secured in a like exemption."

**TAXATION OF NON-RESIDENT HOLDERS OF NATIONAL BANK SHARES.—LAW OF MASSACHUSETTS.**—The legislature of Massachusetts having passed an act (June 11th 1868), taxing shares of non-resident holders, the Boston Clearing House submitted the question of its validity to counsel, and Hon. Benjamin F. Thomas (late a judge of the Supreme Court of Massachusetts,) has given an opinion (printed in full in *Bankers' Magazine* for December 1868) that the law is unconstitutional.

**PATENT-RIGHT.—HARD RUBBER.**—In *Goodyear's Adm'r. v. Berry et al.*, in the United States Circuit Court, Southern District of Ohio, the complainant filed a bill alleging an infringement of the reissued patent of Henry B. Goodyear, administrator of Nelson Goodyear, for hard or vulcanized india rubber, in the making of plates for artificial teeth. The principal grounds of defence were:—

1. That the reissued patents to Henry B. Goodyear are void, as not being for the same invention as the original.

2. That the reissues were improperly granted.

3. That no infringement is proved.

LEAVITT, J., delivered (November 14th 1868), an elaborate opinion detailing the facts and history of the invention. The original patent to Nelson Goodyear was for the process of hardening or "vulcanizing" the plastic rubber produced by the process patented by Charles Goodyear. In the reissued patent of Nelson Goodyear's administrator the words "or other vulcanizable gums," are added after the words india rubber, which defendants argued made the reissue for a different and broader invention than the original patent, and therefore void.

The court was of opinion, however, that on a fair construction the reissued patent claimed substantially the same invention as the original, and that the words "or other vulcanizable gums," were merely added from abundant caution to cover the different varieties of india rubber or caoutchouc already known to commerce and more or less adapted to vulcanization.

On the subject of the reissue the court held that the judgment of the commissioner of patents in granting the reissue, though not conclusive of the substantial identity of the invention claimed in the original and the reissue, afforded a strong presumption to that effect, and in this case the court, for reasons above stated, was of opinion that the inventions were the same.

The court held, further, that the infringement was established, and in this part of the opinion discussed the vulcanizing process patented by Edward L. Simpson October 16th 1866, holding that the latter is merely an improved method, requiring the use of Goodyear's method and therefore an infringement of the latter.

**EXTRADITION.**—In the case of *Reno and Anderson*, the express robbers, charged with assault with intent to murder, Chief Justice DRAPER, of the Court of Queen's Bench of Upper Canada (since promoted to the presidency of the Court of Appeal of the New Dominion), delivered at Toronto, October 1868, an elaborate opinion, marked with strong common sense and a liberal and statesmanlike view of the Extradition Laws. Of the merits of the numerous technical points as to the authority of the committing magistrate and the regularity of returns, &c., under the laws of Canada, we do not assume to speak; but on the point most strenuously urged, to wit, that the evidence for the prisoner clearly established an *alibi*, the Chief Justice puts his decision with great force and clearness on the true view of the law, that the duty of the magistrate is to inquire whether a case exists which would justify commitment if the crime had been alleged as done in Canada; the weighing of the evidence so as to decide on the prisoners' guilt, is no part of his duty, but of the jury's. The prisoners therefore were held for extradition.

The same remarks will apply also to the cases of *Morton and Thompson*, before the Court of Common Pleas of Canada, November 27th 1868. The principal point of law urged for the prisoners was, that the warrant issued in the United States after the arrest in Canada, and therefore the depositions on which it issued could not be read as evidence on the proceedings in Canada. The court, however, HAGARTY, C. J., and WILSON, J., delivering opinions, overruled the point, and held the prisoners.

**INDIAN MARRIAGES.**—In the case of *Jacob Smith v. James H. Brown*, in the District Court of the Third Judicial District of Kansas, a question arose as to the validity of Indian marriages. GILCHRIST, J., charged the jury that under the Treaty of 1825 with the Kansas Nation, and the Acts of Congress, the marriage of a white man residing in the Indian country and an Indian woman, according to the customs and ceremonies of the Kansas Nation, was valid, and the descent of lands in the Kansas Indian reservation must be governed by the Indian law.

**ACCIDENT INSURANCE.**—The case of *Southard v. Railway Passengers' Assurance Co.*, decided (July 1868) by Hon. WM. D. SHIPMAN, Judge of the U. S. District Court for Connecticut, acting as arbitrator, presents a question likely hereafter frequently to arise, viz., What is an accident?

The company had insured plaintiff against loss from "bodily injuries effected through violent and accidental means," and subject to certain conditions, one of which was as follows: "Provided always, that this

insurance shall not extend to any injury of which there shall be no visible sign, nor to any death or disability which may have been caused wholly or in part by bodily infirmities or disease."

The facts were, that plaintiff being on business at Newcastle, Del., made an engagement to meet a person at the depot, and on going there and not meeting him, got on board the train of cars; but, on being informed that there was another depot, some distance off, concluded to leave the train, and somewhat excited, as he says, jumped off from the rear end of the train. He felt no shock, and walked briskly to the other depot, where he found the man he was in search of. He remained there till about time for the next train, and then returned to the other depot. While going back, he heard what he supposed to be the train coming in, started suddenly, and ran to where he could see, and found that it was not the train, when he walked the rest of the way to the depot, took the cars, and returned to Philadelphia.

Some time during the journey from Newcastle to Philadelphia, and on the same day, he felt pain about one knee, but did not refer it to his movements at Newcastle.

After he arrived at Philadelphia, and had transacted some business, he called on a physician, and consulted him about dyspepsia, an old complaint with which he had for some time been more or less afflicted. The physician, while examining his person, found a partially-developed rupture on his right loin. Southard then referred it to his jumping off the cars, or to his running, at Newcastle.

This rupture increased, and, finally, for several weeks, disabled him from business. For this disability he claimed a weekly compensation, under his policy, for the time it continued.

The arbitrator held that this was not an accident within the policy.

**STRIKING AN ATTORNEY FROM THE ROLL.**—We have received a pamphlet report of the proceedings in the Supreme Court of New Hampshire, ending in striking the name of *Joseph Clark* from the list of attorneys of that court. As the evidence proved a long series of crimes and misdemeanors, including what is perhaps the climax of professional villany, accepting a fee from a client and treacherously advising the adverse party, we only wonder that the court did not take this action long ago.

J. T. M.

## ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW HAMPSHIRE.<sup>1</sup>

SUPREME COURT OF NEW YORK.<sup>2</sup>

SUPREME COURT OF PENNSYLVANIA.<sup>3</sup>

### BAILEE.

*Conversion by.*—Where a bailee of goods absolutely refuses to deliver them to the owner, on demand; or assumes to be himself the owner; or

<sup>1</sup> From the Judges; to appear in 47 or 48 N. H. Reports.

<sup>2</sup> From Hon. O. L. Barbour, Reporter; to appear in vol. 51 of his reports.

<sup>3</sup> From P. F. Smith, Esq., Reporter; to appear in 56 Penna. State Reports.

interposes an unreasonable objection to delivering them; or exhibits bad faith in regard to the transaction; a conversion of the property may be inferred: *Carroll v. Mix*, 51 Barb.

But where the defendant received goods from B. without knowing who was the owner, but having every reason to suppose B. to be the owner, and, on demand being made by a third person claiming to be the owner, did not set up any claim to them, nor dispute the claimant's right; but stated, in substance, that he did not know the claimant was the owner; that the property was left by B., and that he desired the order of his father, or B., before delivering the same, or an opportunity to confer with his father in regard thereto; *Held*, that this was not such a refusal as amounted to a conversion of the goods: *Id.*

### BILLS AND NOTES.

*Interest—By what Law computed.*—The law of the place where a note, which stipulates for the payment of interest, is made, will govern as to the rate and rule for casting interest thereon, unless some other place of payment is stipulated, in which case the law of the place of payment will govern in that respect: *Chase v. Dow*, S. C. N. H.

But where, by the terms of a note, no interest is payable, the rule might be different: *Id.*

This rule would not be affected by the notes being secured by a mortgage on lands in another state where the rate of interest or the rule for casting it differed from that where the note was given, unless the circumstances show that the parties had in view the laws of the place where the land was located, in respect to the interest: *Id.*

### BROKER.

*His Authority.*—An agent employed to sell goods on commission is a mere broker. As such, he is authorized to make contracts for the sale and delivery of the goods, but is not authorized to make such contracts in his own name; nor to receive payment for the property so sold: *Dunn v. Wright*, 51 Barb.

*Set-off by Purchaser, of Debt due from Broker.*—Where goods thus sold by a broker are not intrusted to his possession, but are sent by the seller to the purchaser directly, with a bill or invoice thereof, and the purchaser receives the goods with notice that the broker does not own them and has no right to receive payment for them, he cannot set off a debt due to him from the broker, against the claim of the vendor, for the price: *Id.*

### CONSTITUTIONAL LAW.

*Obligation of Contracts.*—Alterations may be made in remedies, though the creditor may thereby be hindered and delayed, if they do not substantially deprive him of the right he had when the contract was made: *Penrose v. The Erie Canal Company*, 56 Penna.

A state legislature cannot enact that a debtor's property shall not be taken to satisfy his debt, if it was so liable when the debt was incurred: *Id.*

### CRIMINAL LAW.

*Searching the Persons and taking away Property of Prisoners.*—If an

officer unlawfully obtains possession of a debtor's property, as by breaking into his dwelling-house, or arresting his person without proper authority to do so, for the purpose of attaching such property on mesne process or levying upon it on execution, such attachment or levy will be void: *Closson v. Morrison*, S. C. N. H.

An officer who has arrested a prisoner on a warrant charging him with the commission of a crime, may ordinarily search him so far as to ascertain if he have deadly or dangerous weapons on his person or in his possession, and if such are found he may seize them and hold them until they can be safely returned or otherwise properly disposed of, if in good faith he believes such course necessary for his own or the public safety, or for the safe-keeping of the prisoner: *Id.*

If a prisoner has about his person money or other articles of value by means of which, if left in his possession, he might obtain tools or implements, or assistance or weapons, with which to effect his escape, the officer arresting him may seize and hold such for a time without being liable for a conversion of the property, if he acts in good faith and for the purposes aforesaid: *Id.*

It is a question of fact, in such cases, for the jury whether the officer taking such property from his prisoner acted in good faith or for a proper purpose, or in bad faith, with an improper and unlawful purpose: *Id.*

If an officer, having arrested a prisoner upon a warrant, should take money from his person simply for the purpose of getting possession of it, so that he might attach it on writs which he then held or was expecting to receive against the prisoner, his possession of the property being obtained fraudulently and unlawfully, the attachment which he might thus make would be void: *Id.*

But if the officer took the money from his prisoner in good faith and solely to secure his safe-keeping, and while he was thus properly and lawfully holding the money, a writ be put into his hands against the prisoner, he may lawfully attach the money, and such attachment will be valid: *Id.*

In such case, if there were no evidence upon the question of good faith in taking the money, or if, upon all the evidence, the jury should be unable to find a preponderance either way upon that question, the presumption should be in favor of the officer: *Id.*

ELECTIONS. See *Quo Warranto*.

#### ESTOPPEL.

A party who claims that another, seeking to enforce his rights, shall not be permitted to allege and show the truth, must establish that he had been induced by his faith in, or reliance upon, the assertions or acts of such party to the contrary, to do some act or incur some liability which would make it injurious to, or a fraud upon, him to allow such truth to be shown: *Genkinghouse v. Whitwell*, 51 Barb.

A party setting up an estoppel must be personally misled or deceived by the acts which constitute the estoppel alleged; and he must have a particular interest in such acts, more than the public at large. He must have trusted to them, and confided in them, in some particular business transaction: *Id.*

Nothing in the mode of conducting the business in a store—such as the name over the door and on the window-shades, newspaper advertisements, &c.—can operate as an estoppel, in respect to the ownership of the business and goods, as between a person claiming to be the owner and the plaintiff in a judgment recovered against a third person before the commencement of the business in such store, or the sheriff acting as the agent of such plaintiff, under an execution. The mode of carrying on a subsequent business cannot have influenced the giving of a previous credit: *Id.*

#### EVIDENCE.

*Inspection by Judge.*—When the signature of an instrument is to be proved to render the instrument competent evidence for the jury, if the presiding judge is acquainted with the handwriting of the signer, and is satisfied, upon inspection, that the signature in question is genuine, that is sufficient *prima facie*, without other proof of the genuineness of the signature: *Brown v. Lincoln*, S. C. N. H.

EXECUTION. See *Criminal Law*.

#### HIGHWAY.

*Action for Defect in—Pleading.*—In a suit against a town for damages alleged to have been caused by a defect in a highway therein, and verdict for plaintiff, judgment will not be arrested because in the plaintiff's declaration it is alleged that the "*Inhabitants of said town*" were bound to keep said highway in repair, instead of alleging that "*the town*" was thus bound: *Flanders v. Stewartstown*, S. C. N. H.

*Quære.*—Whether the statement in the declaration that there was in, &c., on, &c., "*a public highway*," is not sufficient, and whether it would not follow, as a necessary legal sequence, that the town in which it was located was bound to keep it in repair? *Id.*

INTEREST. See *Bills and Notes*.

#### LANDLORD AND TENANT.

*Shares in Crops.*—Ordinarily when land is leased for one crop for one year or for several years, and the owner of the land is to receive a part of the produce of the land instead of rent, the contract operates and takes effect by way of reservation, and the lessor and lessee become tenants in common of the crops, though the lessee may be entitled to the possession of the land: *Brown v. Lincoln*, S. C. N. H.

#### LEGAL-TENDER NOTES.

*Trover for Money paid into Court.*—In an action of ejectment for specific performance, the plaintiff had a verdict and paid the purchase-money in gold into court, to be taken out by the defendant on his filing a deed. The prothonotary deposited the money with reliable bankers to his own credit. They employed the money as other deposits, without profit as coin; it was always subject to the prothonotary's draft. The defendant filed his deed after the passage of the Legal-Tender Law, and the prothonotary offered to pay him the money in court in legal tenders, which he refused, and brought trover for the gold. *Held*, that he could not recover: *Aurentz v. Porter*, 56 Penna.

## LICENSE.

*Revocability.*—In a written agreement, not under seal, between P. and A., the former agreed that A. should have leave to cut timber and wood on his land, and the latter agreed that P. should have leave to flow his lands by a dam, to a certain extent. *Held*, that though the licenses in this case may have been mutual, so far as that one may have been given in consideration of the other, yet that they were independent, and that either party may revoke his license so far as it remains unexecuted, at his option, whether the other party revokes his or not: *Dodge v. McClintock* S. C. N. H.

MORTGAGE. See *Bills and Notes*; *Wild Land*.

## NATIONAL BANK.

*Debts of State Bank becoming National Bank.*—A national banking association organized from a state bank, and receiving its assets, is liable for its debts: *Thorp v. Wegefarth*, 56 Penna.

Where one was a debtor to a state bank, and also its creditor by holding its notes, the mutual obligation continued, and the national association was bound to receive the notes in payment of the debt, whether insolvent or not: *Id.*

Judgment was recovered against one for a debt to a national association; he procured notes of the original state bank. *Held*, that he had no right of set-off against the judgment: *Id.*

A debt not in judgment cannot be set off to a judgment: *Id.*

After a national association had become insolvent, its debtor could not purchase notes for which it was liable to set-off against his debt: *Id.*

There is no right to tender a chose in action against the creditor in payment of a judgment or execution: *Id.*

## NEGLIGENCE.

*County Bridge.*—It is the duty of county commissioners, being informed that a county bridge was unsafe, to examine it thoroughly, and repair it so as to render it perfectly safe, or to close it up so as to prevent the public from using it: *Humphreys v. The County of Armstrong*, 56 Penna.

A bridge fell as a resident in the neighborhood was passing over, and injured him. In an action by him against the county, the court charged that if the plaintiff knew the condition of the bridge, notice or warning to him would not be necessary. *Held* to be error: *Id.*

The passing of the plaintiff over the bridge with knowledge of its unsafe condition, but without distinct notice to him or the public not to use it, was not contributory negligence on his part: *Id.*

## QUO WARRANTO.

*Elections.*—*Quo warranto* is not a writ of right: *Commonwealth ex rel. McLaughlin v. Chuley*, 56 Penna.

Statute 9 Anne, ch. 20, was not at first adopted in this state, but its provisions were incorporated into our revised code: *Id.*

The enactment that writs of *quo warranto* may be issued on the suggestion of any person desiring to prosecute the same, means any person having an interest to be affected: *Id.*

Where at an election for sheriff a majority of the votes are cast for a disqualified person, the next in vote is not to be returned as elected: *Id.*

The suggestion alleged that at an election for sheriff the person returned was disqualified. The candidate next in vote had no such interest as entitled him to be heard in a *quo warranto*. The question was exclusively a public one, and could be raised only by the attorney-general: *Id.*

#### RAILROAD.

*Charter by two States.*—A charter granted by two states to a company to construct a railroad is not only a contract with the company, but a compact between the states. It is to be liberally construed with reference to its objects. Like a treaty, it is the law of the contracting states, not being subject to interpretation by the local usages of either. The same construction must be made in both: *The Cleveland and Pittsburg Railroad Co. v. Speer*, 56 Penna.

SET-OFF. See *National Bank*.

#### SUBROGATION.

*When it arises.*—Subrogation is purely an equitable result, and depends on facts to develop its necessity, that justice may be done: *Mosier's Appeal*, 56 Penna.

Privity of contract is not necessary. Subrogation exists on equity and benevolence, and will not arise in favor of a mere stranger, but only in favor of a party who on some sort of compulsion discharges a demand against a common debtor.

Subrogation is applicable wherever a payment is made under a legitimate and fair effort to protect the ascertained interests of the party paying, and where intervening rights are not legally jeopardized or defeated: *Id.*

Numerous judgments were entered against two debtors, some joint and some several, executions were issued, and land held jointly levied on. The court ordered the undivided interest of one of the debtors to be sold separately. A junior judgment-creditor, believing the land would be sacrificed, after the execution-plaintiffs had refused to assign their judgments to him on payment, paid the executions to the sheriff, and satisfaction was entered. No other liens having intervened, he was subrogated to the rights of the execution-plaintiffs, and the satisfaction cancelled: *Id.*

TENANT IN COMMON. See *Landlord and Tenant*.

TOWN. See *Highway*.

#### WILD LANDS.

*Entry on one of several Parcels.*—When several detached lots of wild and unoccupied land in the same county are conveyed in mortgage by



one deed and upon one and the same condition, an entry by the mortgagee upon one such lot, in the name of the whole, would give him constructive legal possession of all the lots in the same county, as against the mortgagors and also as against any person afterwards entering without right upon any of said lots: *Green v. Pettingill et al.*, S. C. N. H.

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#### NEW LAW BOOKS RECEIVED BY THE PUBLISHERS OF THE AMERICAN LAW REGISTER.

GHOLSON.—Speeches of Hon. W. Y. Gholson, on the Payment of the Principal of the Public Debt of the United States, and on The Reconstruction of the Southern States. 8vo., pamph., pp. 32, 20. Cincinnati: R. Clarke & Co., 1868.

IOWA.—Reports of Cases in Law and Equity determined in the Supreme Court of Iowa. EDWARD H. STILES, Reporter. Vol. 2, being vol. 23 of the series. 8vo., pp. 654. Ottumwa: published by the Reporter, 1868.

PAINÉ.—Resumption of Specie Payments. Enforced contraction of the currency will cause distress and panic; enhancement of its value followed by voluntary funding of the excess of currency thus created is the only safe plan. By ROBERT TREAT PAINE, JR. Pamph., 8vo., pp. 58. Boston: Little, Brown & Co., 1868.

POLITICAL ORGANIZATION.—Essays on Political Organization, selected from those submitted in competition for the prizes offered by the Union League of Philadelphia. 8vo., pamph., pp. 106. Philadelphia: printed for the Union League, 1868.

QUARTERLY JOURNAL OF PSYCHOLOGICAL MEDICINE AND MEDICAL JURISPRUDENCE. Edited by William A. Hammond, M. D. Vol. 2, No. 4, October 1868. New York: D. Appleton & Co. \$5 per annum.

UNITED STATES.—The Acts of Congress relating to Loans and the Currency, from the year 1847 to 1868, including those relating to the Bonds of the Pacific Railroad Companies, with a Synopsis of each Act, and a Comparative Table of the Public Debt in 1867 and 1868. 8vo., pp. 77. New York: Bankers' Magazine Office. Cl. \$2.

VERMONT.—Reports of Cases in the Supreme Court of Vermont. By W. G. VEAZEY. Vol. 40. 8vo., pp. 726. Rutland: Tuttle & Co. Shp. \$5.

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## THE ENGLISH JUDICIAL SYSTEM.<sup>1</sup>

THE English judicial system comprises, among others, the following tribunals:—the Courts of Requests; the County Courts; the great courts of original common-law jurisdiction, such as the Common Pleas, King's or Queen's Bench, and Exchequer; the like courts of equity jurisdiction, such as that of the Vice-Chancellors, the Master of the Rolls, the Lords Justices and the Lord Chancellor; the Court of Probate, Divorce, and Admiralty; the Criminal Courts, such as the Petty Sessions, Quarter Sessions, the Oyer and Terminer, and the Central Criminal Court. Finally, there are the strictly appellate courts, such as the Court of Criminal Appeal, the Court of Exchequer Chamber, the Judicial Committee of the Privy Council, and the House of Lords.

These various courts will be grouped together under the following arrangement:—

- I. *The Courts of Requests and Councils of Conciliation.*
- II. *The County Courts.*
- III. *The Superior Courts of Common Law Jurisdiction.*
- IV. *The Superior Courts of Equity Jurisdiction.*
- V. *The Courts of Probate, Divorce, and Admiralty.*
- VI. *The Criminal Courts.*
- VII. *The Strictly Appellate Courts.*

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<sup>1</sup> The object of this article is to give a general view of the English courts as at present constituted. It has been thought that the use of the new English Reports might thus be materially facilitated. Some comparison is instituted between these courts and those now subsisting in New York.

### I. COURTS OF REQUESTS AND COUNCILS OF CONCILIATION.

The organization of *Courts of Requests* is detailed in Tidd's Practice, vol. 2, pp. 988-993. They are substantially courts established in various cities and towns for the recovery of small debts, not exceeding, generally, five pounds. In such cases a plaintiff cannot recover costs if he sue elsewhere.

A Council of Conciliation, to adjust amicably matters of difference between masters and workmen, not including servants in husbandry, may be licensed and thus come into existence under 30 & 31 Vict. c. 105 (1867).

### II. COUNTY COURTS.

There had existed in England from the time when the kingdom was divided into shires or counties, that is from the time of Alfred, a court in every county, known as the *County Court*. They were anciently the chief courts, but after Magna Charta their powers were restricted, and they were ultimately reduced in civil cases to actions involving no greater amount than forty shillings, where the cause of action arose in and the defendant dwelt in the county; in addition to which the practice in these courts was complicated and dilatory as well as expensive, and in certain cases actions had to be brought upon their judgments to render them effectual.

In 1846 (28th August, 9 & 10 Vict. c. 95), an Act of Parliament was passed, by which they were converted into most useful courts, and they are now among the most popular tribunals in England.

Under this act the counties of England were divided into districts, in each of which a County Court was directed to be held, for the recovery of "any *debt, damage, or demand*, not exceeding fifty pounds," at least once a month, or at such other intervals as a Secretary of State may direct. There are in England and Wales fifty-two counties, which in 1857 comprised sixty circuits, each circuit embracing several towns or judicial districts, and for each a county judge is appointed by the Lord Chancellor. The city of London proper is not embraced in this arrangement, but has a court of its own for the recovery of small debts, but the other parts of London are.

In addition to its common-law jurisdiction, which has been much

extended, the County Court has recently had important equitable and admiralty jurisdiction conferred upon it (31 & 32 Vict. c. 71); and it may exercise the powers of a Court of Probate in certain cases.

The mode of procedure in law and equity, is regulated by a complete set of rules, found in the "Weekly Notes" of January 11th 1868.

The judge tries an action for the recovery of money, unless, where the amount is beyond five pounds, one of the party demands a jury. Either party may also demand a jury in cases of interpleader, replevin, and proceedings in the nature of *scire facias*; other actions are tried by the judge alone. Ten jurymen are summoned to attend a court for the trial of causes, unless the judge shall otherwise order.

The judge may direct a judgment for money to be collected by instalments, or he may stay the collection or the payment of the instalments temporarily, in cases where the party is unable from sickness or other sufficient cause to discharge the debt.

The judge may in his discretion grant a new trial.

These courts are organized under the following acts: 9 & 10 Vict. c. 95 (28 Aug. 1846); 12 & 13 Vict. c. 101 (1 Aug. 1849); 13 & 14 Vict. c. 61 (14 Aug. 1850); 15 & 16 Vict. c. 54 (30 June 1852); 19 & 20 Vict. c. 108 (29 July 1856); 28 & 29 Vict. c. 99 (1865); 31 & 32 Vict. c. 71.

### III. THE HIGHER COMMON LAW COURTS.

1. *The Court of Common Pleas*.—The jurisdiction of this court is well known. It is mentioned in *Magna Charta*, and was at that early day fixed at Westminster. It consists of a chief justice and five<sup>1</sup> *puisne* judges. An appeal lies from this court to the Exchequer Chamber, which is in that case composed of the judges of the Courts of Queen's Bench and the Exchequer.

2. *The King's or Queen's Bench*.—This court has both civil and criminal jurisdiction. It also keeps inferior courts within the bounds

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<sup>1</sup> Each of these courts, until recently, consisted of five judges. An "additional" judge was appointed in each of the courts August 24th and 25th 1868: Weekly Notes 499, September 5th 1868. The authority to make such appointment is found in 31 & 32 Vict. c. 125. The principal object of this increase of number, is to form a "rota" of judges to try petitions of elections—one judge being taken from each court.

of their authority, commands magistrates and others to do their duty when there is no other specific remedy, and superintends all civil corporations. It consists of a chief justice and five<sup>1</sup> *puisne* judges. An appeal lies from its decisions to the Exchequer Chamber, which in that case consists of the judges of the Courts of Common Pleas and Exchequer.

3. *The Court of Exchequer*.—This was at one time both a court of law and a court of equity. Its jurisdiction as a court of equity is abolished and transferred to the Court of Chancery: 5 Vict. c. 5. It is now only a court of law and revenue.

Its ordinary jurisdiction as a court of law was originally gained by a legal fiction. It may now be said that nearly every civil case can be brought before this court, though it cannot issue the prerogative writs of the Queen's Bench. It consists of a chief baron and five<sup>1</sup> *puisne* barons; an appeal lies from this court to the Exchequer Chamber, which in that case consists of the Judges of the Queen's Bench and Common Pleas.

It is enacted by 13 Wm. III. c. 2, that the commissions of the judges of the superior courts shall be made during good behavior, and their salaries ascertained and established; but that they may be removed on address of both Houses of Parliament. By 1 Geo. III. c. 23, and 1 Ann. st. 1, c. 8, they are continued in office notwithstanding the death of the king, for six months after such decease. The rule of life tenure was adopted, "because the independence and uprightness of the judges was looked upon as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of the people; and as most conducive to the honor of the state," Commons Journals, 3d March 1761. Provision is made for a retiring pension after fifteen years' service.

4. *The Commission of Assize and Nisi Prius* tries such causes in the great Courts of Common Pleas, Queen's Bench, and Exchequer, as are ripe for trial by jury. It is composed of two or more commissioners, of whom a judge of the superior courts, or a sergeant at law, or barrister of certain standing, must be one, who are twice in every year (except in certain northern counties) to hold Circuit or "Nisi Prius" courts in each county. This rule does not apply to London and Middlesex, where courts of this

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<sup>1</sup> See note on preceding page.

kind are held much more frequently to accommodate the pressure of business. The practical result of this system is, that the judges of each of these courts try questions of fact with a jury, and also sit in *banc* to review the decisions which are made in the court below.

It is substantially the system now existing in New York, and permits a judge to review in *banc* his own rulings at *Nisi Prius*.

#### IV. THE SUPERIOR COURTS OF EQUITY.

The judges in the Courts of Equity consist of three Vice-Chancellors, a Master of the Rolls, two Lords Justices, and the Lord Chancellor.

1. *The Courts of the Vice-Chancellors*.—The first act upon the subject of the Courts of the Vice-Chancellors, 53 Geo. III. c. 24 (23d March 1813), created a single Vice-Chancellor, known as the Vice-Chancellor of England. Under a late act, 5 Vict. c. 5, two additional Vice-Chancellors were created: see, also, 14 & 15 Vict. c. 4; 15 & 16 Vict. c. 80. These statutes substantially provide that each of the Vice-Chancellors shall hold a separate court, and may exercise all the jurisdiction of the Court of Chancery, subject to the appellate jurisdiction of the Chancellor, or of the Court of Appeal in Chancery. There can be no appeal from one Vice-Chancellor's decision to another. The tribunals of the Vice-Chancellors form substantially three separate courts of original jurisdiction in equity, which are called by the name of the Vice-Chancellors who sit in them.

2. *The Master of the Rolls* was originally the chief of the masters in chancery, and has, for a long period, administered justice in a separate court. His jurisdiction, which was for a long time in dispute, and which formed the subject of a learned examination, attributed to Lord Hardwicke, is now regulated and defined by the statutes of 3 Geo. II. c. 30, and by 3 & 4 W. IV. c. 94, § 24. An appeal lies from his judgment to the Lord Chancellor, or to the Court of Appeal in Chancery. Thus, by reason of this tribunal, there is substantially a fourth Court of Equity of original jurisdiction. The Master of the Rolls is also custodian of the public records: 1 & 2 Vict. c. 94. This judge is sometimes a peer, and can, in that case, of course, participate in the judicial business of the House of Lords. This is the case with the present judge, Lord ROMILLY.

• 3. *The Court of Appeal in Chancery.*—The office of Lord Justice of the Court of Appeal in Chancery was created by 14 & 15 Vict. c. 83. This act provided for a Court of Appeal in Chancery consisting of two Lords Justices and the Lord Chancellor. In practice, the court is held, in ninety-nine cases out of a hundred, by the two Lords Justices. It may be held, however, by one of the Justices with the Lord Chancellor, or by the Lord Chancellor alone; or by either of the Lords Justices under certain restrictions alone: 30 & 31 Vict. c. 64; 31 Vict. c. 11. It is only the judicial powers of the Court of Chancery that are vested in this tribunal—except when the Lord Chancellor is sitting alone. The judges of this court may be designated by the Lord Chancellor to sit for either of the Vice-Chancellors, or the Master of the Rolls, in case of their inability to hold a court. The salary of each Lord Justice is £6000, with provision in certain cases of a retiring annuity of £3750, after fifteen years of service. An appeal lies to this tribunal from the decisions of the Vice-Chancellors and Master of the Rolls, and thence to the House of Lords. It is, however, the final Court of Appeal in Bankruptcy Cases, exclusive of the Lord Chancellor.

This court, though always well manned, is considered by the best authorities to have a faulty construction, as the two judges often differ in opinion, whereupon, the case substantially remains undecided. In such a case, there is a technical affirmance of the decree of the lower court.

All the equity judges, already noticed, hold offices during good behavior, in the manner described respecting the judges of the courts of law.

4. *The Lord Chancellor.*—The jurisdiction of the Chancellor is of two kinds—ordinary and extraordinary. In the ordinary jurisdiction he observes the order and method of the common law; the extraordinary jurisdiction is that which he exercises as a Court of Equity.

The jurisdiction of this court is so well known that it is unnecessary to do more than allude to it. The Chancellor holds his office not for life, but at the will of the sovereign. An appeal lies from his judgments to the House of Lords. He hears appeals from the Vice-Chancellors and Master of the Rolls, either alone, or as a member of the Court of Appeal in Chancery. The office may be filled by a person having the title of Lord Keeper, or in

case of a vacancy, by Commissioners who exercise both the common law and statutory powers of the Lord Chancellor: see 3 & 4 W. IV. § 80.

#### V. COURTS OF PROBATE, DIVORCE, AND ADMIRALTY.

1. *Court of Probate*.—It is well known that the Surrogates' Courts of New York are modelled on the plan of the Ecclesiastical Courts, which formerly existed in England. The system now abandoned in England still remains in force in that state.

This change in the English system occurred in 1857. By 20 & 21 Vict. c. 77, as modified by 21 & 22 Vict. cc. 56 and 95, an entirely new organization was introduced. The voluntary and contentious jurisdiction of ecclesiastical and other courts having probate powers ceased. It is hereafter to be exercised by a Court of Probate, having a single judge, who holds his office during good behavior. He must be an advocate of ten years' standing, or a barrister of fifteen years' standing. He receives a salary of £4000, or in case he discharges the duties of either the Court of Admiralty or of Divorce, or of both, £5000. A provision is made for a retiring pension.

This court is a Court of Record, having the powers of the former Courts of Probate. There can be no suit brought therein for legacies, or for the administration of assets. A common-law judge, or judges, may sit with the judge of the Court of Probate. It has the same powers over practitioners as common-law and equity judges. The judge may try questions of fact with a jury, or may send the issue to trial in a court of law. The issue in each case is framed in writing under the direction of the court, which has the same power over the subsequent proceedings as a common-law or equity judge. The judge may sit at chambers with the same power as in open court. The court may appoint receivers *pendente lite*.

The decision of the court in testamentary causes, when made "in solemn form," is conclusive, both upon real and personal estate, if heirs and other persons interested have been duly cited, though probate may be revoked by the court. If the will is proved "in common form," and without opposition, it may be made "sufficient," though not conclusive, evidence in any particular action where its validity might otherwise be drawn in question in this manner:—The party who desires to sustain the will may



give ten days' notice that he intends to offer the will in evidence, whereupon if the other party intends to dispute it, he must give four days' notice of such intention. *Barraclough v. Greenough*, in the Exchequer Chamber, reversing. s. c. in Queen's Bench, 2 Law Rep. Q. B. 1, 612.

The judge of the Court of Probate and of Admiralty may sit for each other: 21 & 22 Vict. c. 95.

An appeal lies from decisions in contentious causes to the House of Lords.

When personal property is duly sworn to be worth under £200, and real estate under £300, the County Court has contentious jurisdiction, with an appeal to the Court of Probate.

The formal business of probate is transacted in the following manner:—there is a principal registry at London and forty district registries. In each district there is a district registrar; in the principal registry there are four registrars, with record keepers and other officers. The registrars and district registrars are appointed by the judge, and hold office during good behavior; clerks are appointed by the registrar for whom they act, with the sanction of the judge. Some of these officers are removable by the Lord Chancellor, and others by the judge, with the assent of the Chancellor. Registrars and district registrars must be attorneys or solicitors, and are not permitted to practise law. They have the same general powers as surrogates formerly had; they may grant probate in common form, in the name of the Court of Probate. They cannot proceed in contentious causes; when the district registrar is in doubt, respecting his duty to grant or refuse probate, he refers the case in writing to the judge, who may allow or forbid the application, or require it to be made at the principal registry.

Whenever probate is applied for at the district registry, the district registrar immediately gives notice to the principal registrar, who informs him in turn whether there is any other application pending in any other district upon the same estate. Application for probate may be made directly to the principal registrar, instead of to the district registrars.

Lists of all grants of probate and administration are sent within a limited time to the principal registrar.

2. *Court of Divorce*.—Until 1857, divorces could only be had by special Act of Parliament. By 20 & 21 Vict. c. 85, 22 Vict.

c. 108, and 23 & 24 Vict. c. 144, now made perpetual, a Court of Divorce was created, and its jurisdiction defined.

This court is composed of the Judge of Probate, Lord Chancellor, and the judges of the superior common law courts. The Probate Judge is made Judge Ordinary, and may act alone or with the other judges. In his temporary absence, the Lord Chancellor may select from the common-law judges a temporary Judge Ordinary.

The court acts on the former principles of the Ecclesiastical Courts. It may declare a marriage null, or it may dissolve it, award alimony and damages against an adulterer, and make a decree respecting the custody of children. Any judge may try questions of fact with a jury, and may grant new trials; or may order an issue to be framed and tried in a court of law. The judge may act at chambers with the same power as in court. This tribunal has the same power over practitioners as the common law and equity courts. An appeal lies from the decisions of the judge to the full court (which is organized under court rules), and from any decree of the full court annulling or dissolving a marriage to the House of Lords. The judge ordinary may, and usually does, exercise all the powers of the full court, in which case an appeal lies directly to the House of Lords.

This court may also entertain jurisdiction, under certain restrictions, of cases where a declaration of legitimacy is asked for. This declaration is final against all parties cited: 21 & 22 Vict. c. 93.

No action against an adulterer "for criminal conversation," can now be entertained in the common-law courts, but proceedings must be had before this tribunal.

The registrars of the Court of Probate are the registrars of this court, having the same power as surrogates under the Ecclesiastical Law.

3. *The High Court of Admiralty* is held by a single judge. On the retirement of the incumbent in office, when the "Probate Act" was passed (1857), the Queen may appoint the Probate Judge to sit in the Court of Admiralty. Under these provisions, the Crown may appoint the same person judge of the three courts (Probate, Divorce, and Admiralty), and after the union of these offices, they are to be held by the same person.

## VI. THE CRIMINAL COURTS.

The criminal courts may be divided into the superior and inferior. The inferior are the general and quarter sessions of the peace. The superior embrace the assizes, including the commissions of Oyer and Terminer, general gaol delivery, assize, and Nisi Prius, as well as courts held under special commissions, the Admiralty Sessions, the Court of King's Bench, and the Central Criminal Court.

1. *The Inferior Criminal Courts.*

The term, "sessions of the peace," is employed to designate a sitting of justices of the peace, of which there are four kinds, petty, special, quarter, and general sessions. The general and quarter sessions only require notice. The general sessions is a court of record. The court may be divided into two branches for the despatch of business. By statute, it must be held four times a year, and oftener, if occasion shall require. When held at the regular period, it is called the quarter sessions; at other times, the general sessions. In the county of Middlesex the same persons are commissioned to hold the sessions and a Court of Oyer and Terminer, at the sessions house, in the Old Bailey.

Though the court of quarter sessions has, theoretically, jurisdiction over felonies, yet practically, except in Middlesex, it only entertains cognisance of petty larcenies and misdemeanors. Cases may be removed into the King's Bench on *certiorari*. There are also quarter sessions held in corporate towns and boroughs by justices of their own. By 5 & 6 Vict. c. 53, and 7 & 8 Vict. c. 50, counties and boroughs may unite and form district courts.

2. *The Higher Criminal Courts.*(a) *The Assizes.*

These are held before commissioners, among whom are usually two of the common-law judges. They are held twice in each year in every county, except the four northern ones, where they are held only once, and except London and Middlesex, where they are held eight times. For the purpose of holding these courts, England is divided into six circuits.

The commissioners sit by virtue of five commissions: a commission of the peace, of oyer and terminer, general gaol delivery,

and the commissions of assize and Nisi Prius. Though the last two named, are in general, commissions of a civil nature, and have been previously mentioned, they give a somewhat extended criminal jurisdiction to the judges, as, for example, when an indictment is removed by *certiorari*, and is tried at Nisi Prius. The same persons are intrusted with all these commissions, so that they may proceed under all at the same time. Those only which demand special notice are the "oyer and terminer" and gaol delivery.

The commission of oyer and terminer is directed to a considerable number of persons, of whom the judges, sergeants at law and King's counsel therein mentioned, or some of them, must attend. They can only proceed upon an indictment found at the same assizes before themselves. They have jurisdiction over felonies and misdemeanors, whether the offender is or is not in custody.

The commission of gaol delivery is only directed to judicial persons, and authorizes the delivery of the gaol of a particular town named in the commission. They may try indictments found before other justices as well as before themselves; but cannot, in general, proceed unless the offender is in actual or constructive custody.

The judges who take the circuits are in each case appointed by the fiat of the King, under the assistance of the Lord Chancellor.

There are also special commissions of Oyer and Terminer on extraordinary occasions. The course of proceeding resembles that followed under the ordinary commissions.

#### (b) *The Admiralty Sessions.*

An account of the organization of this court is omitted. It is described in 1 Chitty's Criminal Law, pp. 153, 156.

#### (c) *The King's Bench.*

This is the highest court of ordinary criminal justice. It has jurisdiction over all criminal cases; misdemeanors are prosecuted by information, and felonies by indictment. The criminal business of this court relates principally to prosecutions by informations and indictments removed into it from other courts by *certiorari*.

#### (d) *The Central Criminal Court.*

This court was created by 4 & 5 Wm. IV., c. 36, and 7 Wm. IV. and 1 Vict. c. 77. The first act provided for the erection

of a district, to be composed of counties and parts of counties. For the purposes of criminal justice, the district was to be regarded as one county, though it embraced London and Middlesex, and parts of Kent and Surrey. Juries may be taken wholly from one county, or from the several counties, indiscriminately.

This is a high court of original jurisdiction, composed of the Lord Mayor of London, the Lord Chancellor, the common-law judges, the aldermen, recorder, and others named in the act. Any two or more may hold the court. This tribunal includes the court of general gaol delivery for London and Middlesex.

The quarter sessions are restrained within the district from trying certain aggravated crimes. Indictments found at the sessions may be removed into this court by *certiorari*. It has jurisdiction over offences committed on the high seas. Its sessions are held in London or its suburbs, twelve times a year.

The court may be organized in parts or branches, presided over by particular members, and designated as "Old Court," "Second Court," "Third Court," &c.

## VII. THE STRICTLY APPELLATE COURTS.

### 1. *The Court of Exchequer Chamber.*

This is a court consisting of the common-law judges who are not members of the court in which the action was originally tried. Thus, if the action is brought in the Common Pleas, the appellate court consists of the judges of the Queen's Bench and Exchequer. The same remark applies to the other courts. Briefly, it may be said that the system provides an appeal from six common-law judges to twelve.

### 2. *The Judicial Committee of the Privy Council.*

This is now the ultimate Court of Appeal in cases of admiralty, cases from the colonial courts and India, and ecclesiastical cases, and has jurisdiction over the extension of patents. It was organized by 2 & 3 Wm. IV., c. 92, 3 & 4 Wm. IV., c. 41, and 6 & 7 Vict., c. 38. It took the place of the Court of Delegates, established 25 Hen. VIII., c. 19. It is a court of record, having power to punish for contempt, &c. It is composed of the President of the Council, the Lord Chancellor, the Chief Justice of the Court of King's Bench, the Master of the Rolls, the Lords Justices of the Court of Appeal in Chancery, the Vice-Chancellors,

Chief Judge of the Court of Bankruptcy, the Chief Justice of the Common Pleas, the Lord Chief Baron, Judges and ex-Judges of the Court of Probate and the Court of Admiralty, two members who have been judges in India or the Colonies, and two persons specially designated by the Crown. The archbishops and bishops, who are privy councillors, are members of this committee only in cases of criminal proceedings in ecclesiastical courts against clerks in holy orders: *Martin v. Mackonochie*, 2 Law Rep. (Adm. & Ecc.) 125. This court comprises, at the very least, from twenty to twenty-four individuals, while a quorum consists of four persons, although appeals may be heard under *special order* by three persons: 2 Macq. 575. The peculiarities of this court are that it has no chief, as the Lord President is not a legal functionary; its members hold office during the pleasure of the Crown, as members of the Privy Council, instead of during good behavior, which is the usual tenure: 2 Macq. 612. "Its members sit at a table, and are less like a court than any other judicial body in the world." There is an objection to the organization of this tribunal, growing out of the fact that it is impossible to tell in advance who will hold the court.

On the other hand, it is advantageous to be able to select as members of the court persons who have made the topic in question a special and particular study. Thus, in the decision of cases coming from India, members of the Privy Council will be selected who have had judicial experience in the law of that country. It is, however, said that this supposed advantage amounts to little in practice, for there are no colonial judges now members of the court, and but two judges from India who are retired Chief Justices of the Supreme Court of Calcutta. The committee does not sit regularly, and there is no "Privy Council Bar:" 25 London Law Magazine, &c., 296 (A. D. 1868). This court proceeds, in certain cases, according to the course of the civil law; may order witnesses to be examined on appeal; may direct issues at common law, and remit a cause to the court below for a rehearing.

The cardinal objection to the scheme is that there are two co-ordinate courts of final appeal: the House of Lords and this judicial committee. There is thus danger of a conflict of decision and of precedent. A certain class of cases reaches final adjudication in the one court, and a certain class in the other. It can-

not be denied that the decisions of this committee have been highly satisfactory, owing to the eminent ability of the men who have participated in them. It has been recently recommended by eminent gentlemen that instead of a double appellate court, there should be something resembling a judicial committee of the House of Lords, upon which leading lawyers might be placed who are not members of the House of Peers. They might report to the House of Lords, which would rarely, if ever, differ from the report. The judicial committee of the Privy Council might thus be abrogated. The present organization is due to the recommendation and exertions of Lord BROUGHAM; but his scheme has recently been pronounced a substantial failure: 25 London Law Magazine, *supra*.

### 3. *The House of Lords, acting Judicially.*

Theoretically, this court consists of the entire number of the House of Lords; practically, none participate in decisions except those who are known as "law lords," being persons who are peers, and are acting judicially, or who have theretofore held judicial positions. The House may call in the common-law judges to advise and assist them, but the latter cannot give a decision, nor even ask a question, and their advice may be overruled: 2 Macq. 582, 599. The equity judges cannot be summoned unless they are Privy Councillors.

The difference between the theoretical and practical organization of the House of Lords leads to results sufficiently curious. As a matter of theory, "there is nothing in the resolution of the House, nor in law or anything except the general understanding and practice of the House, which would debar any half-dozen of the House coming down, and sitting upon appeals and overruling the Law Lords." In practice, the only use of the lay lords is to constitute a quorum. As the rules require that three should constitute a quorum, when only one or two "law lords" are present, one or two lay peers must be called in simply to form a quorum. They are termed in ridicule, "lay figures," take no part in the decision, and do not feel bound to pay any attention to the proceedings.

On a recent occasion, the Lord Chancellor alone constituted the "House of Lords" with two lay peers to form a quorum. He may thus sit on appeal from his own decision, and his vote alone

will sometimes affirm his own decision: 2 Macq. 584, note. Ordinarily the court consists of from three to five "law lords." Of the present "law lords" not one has ever been a judge in the common-law courts, though several of them have had great experience in the equity tribunals.

The leading objections to this court are: (1.) That its members are not bound to attend. As the attendance of members is gratuitous and voluntary, they are frequently absent. (2.) It holds its sessions only during the sitting of Parliament, so that there is much delay in the disposition of causes. (3.) It has lost much of its hold upon the public esteem by the spectacle of single judges sitting in review of their own decisions. Mr. Lewis says: "The paucity of legal members, the absence of any constitutional obligation upon legal members (except the Chancellor) to attend the transaction of judicial business, the irregularity of attendance which the engrossing avocations of those who hold judicial office elsewhere renders in their case unavoidable, the advanced years to which most have in general attained, who, by success in forensic life, reach the peerage—these circumstances have led to a want of confidence in the constitution of this high court, and a feeling of uncertainty in its administration of justice, which has occasionally been justified by the spectacle of one peer sitting in error from the judgment of a court composed of a plurality of judges; or again, the decision of judges specially versed and accomplished in the branch of jurisprudence involved, reviewed by a peer or peers having no such experience, and endowed with no such special knowledge; or again, two peers only attending and differing; or lastly, a single peer sitting alone in one character to adjudicate upon a complaint against the decisions already pronounced by him in another:" Papers of Juridical Society, Vol. 1, 142.

In order to relieve some of the difficulties of the case, a "deputy-speaker," who is a member of the bar, is sometimes appointed. He is not permitted to deliver his opinion in the House, but must retire to an adjoining room, where he can speak. After thus delivering his opinion, he returns to his seat, and remains silent. Then a layman, who is a peer, may move for judgment in accordance with his opinion.

It would seem that the whole of this awkward and complicated machinery might be avoided, if the simple method already alluded



to was adopted. A judicial committee of the House of Lords might be constituted, which should report its decisions to the House, where they might be formally affirmed.

There is a subordinate committee in the House of Lords which attends to much of the formal business connected with appeals, disposing of points of practice.

#### 4. *Court of Criminal Appeal.*

This court is established by 11 & 12 Vict. c. 78. This statute provides that when a person has been convicted before a court of oyer and terminer, gaol delivery, or quarter sessions, the judges before whom the cause was tried may reserve the questions of law arising on the trial for the consideration of the common-law judges. A quorum consists of five members, of whom one shall be chief justice, or chief baron of one of the superior courts. The questions are presented upon "a case," and are argued as before a court in full bench and judgment delivered. The court may make such order in the matter as justice may require, and on reversal may pronounce the proper judgment, or remit the record to the court below for the proper judgment. See 3 Cox's Criminal Cases, Appendix, 3.

### VIII. COURTS NOT DESCRIBED.

There is a considerable number of courts which are here mentioned simply for the sake of completeness. They are the courts of law and chancery in the counties palatine of Lancaster and Durham, the Court of Bankruptcy, the Consistory Courts, the Court of Arches, Courts Martial, Court of Chivalry, Courts Baron, Court of the two Universities, Court for the trial of Impeachments, and of the Lord High Steward. These courts are not described at length, as they are either local in their character, or their nature is such as to attract but little attention from the profession in this country.

T. W. D.

## RECENT AMERICAN DECISIONS.

*Supreme Court of Vermont—November Term 1868.*

## SAMUEL MORSE AND WIFE v. TOWN OF RICHMOND.

Towns owe a statutory duty to travellers, for the breach of which the party injured may maintain an action, to remove from the margins of their highways objects unlawfully deposited there, which, by their frightful appearance, make it unsafe to travel the road with ordinary horses.

The duty of the town to remove the obstruction from the highway does not attach until they know of it, or ought to know of it, nor while it is upon the highway a reasonable time for the purposes of transportation over it.

Though a town is not bound to work the whole width of the road where the travel does not require it, yet they have a right to control the whole width and have a corresponding duty. If they suffer objects to remain deposited on the margin which, by their frightful appearance, make the whole road unsafe, they will be liable for such accidents by fright as are the natural result of their neglect.

Towns are held to a higher responsibility with reference to removing deposits of private property which are placed on the road without right and obstruct public travel by their frightful appearance, than with reference to removing equally dangerous objects which either are incident to the nature of the soil and country or are thrown upon the margin in process of constructing the road.

The defendants excepted to the ruling of the court that if the bales of hay deposited without right by a railway company upon the margin of the defendants' highway presented such an appearance that they might reasonably be expected to and naturally would frighten ordinary horses, and the plaintiff's injury occurred by such fright, the defendant town would be liable, the plaintiff's case in all other respects being first made out, although the surface and width of the travelled path were faultless. *Held*, that there was no error.

Distinction between highway laws of Vermont and Massachusetts.

THIS was an action of trespass on the case for injuries alleged to have been sustained by the plaintiff's wife, by reason of defects and insufficiencies in a certain highway in said town of Richmond, which the defendants were bound to repair.

On trial the plaintiff proved that on June 15th, 1864, a freight train, about 7 or 8 o'clock in the morning, came up on the Vermont Central Railroad, and one of the cars loaded with bales of hay was on fire; that to extinguish said fire the railroad employees unloaded said hay on the depot grounds, and scattered some bales over the depot grounds, and some of said bales, partially charred, were, for the purpose of preventing their consumption and further spread of said fire, thrown into the lines of the highway where the injury happened, and close to the principal travelled track, and

were by the defendants suffered so to remain within the lines of the said highway, and close to the said travelled track, and for several hours after one of the Selectmen of said town had notice thereof, and until after the injury took place.

Evidence was introduced to prove that where said bales of hay lay the road was a good, perfect, smooth, and level road, fit and safe for travel in all its parts, more than fifty feet in width, from the place where any of said bales of hay lay, to some buildings on the opposite side of said road, and that teams in passing this place were not confined to any particular path, but travelled at the pleasure of the driver over a space of 40 feet in width or more in said road, although the greater part of the travel at that point generally passed near to where said bales of hay were lying at the time of the accident.

The defendant requested the court to charge the jury that although some of said bales of hay might have been within the lines of the highway, and might by their so being there have frightened the horse, and thereby have caused the injury, yet if they further found that, at the place where said bales of hay lay, and at the time when said injury happened, the road was in all other respects made of sufficient width, smooth and level for the safety of travellers and their teams in passing, and was not in any respect insufficient or out of repair at the place aforesaid, otherwise than that, by said bales of hay lying within the lines of said highway, as aforesaid, horses might take fright, then the plaintiffs are not entitled to recover.

But the court refused so to charge, and thereupon the defendants excepted not only to the refusal, but also to the charge given, which is sufficiently recited in the opinion.

Section 41 of Chapter 25 of the General Statutes provides that "If any special damage shall happen to any person, his team, carriage, or other property, by means of the *insufficiency or want of repairs* of any highway," the person sustaining such damage shall have a right to recover the same in an action on the case, &c.

*J. French and E. R. Hard*, for plaintiff, cited *Kelsey v. Glover*, 15 Vt. 708; 18 Maine 286; *Cassidy v. Stockbridge*, 21 Vt. 391; *Willard v. Newbury*, 22 Vt. 458; *Batty v. Duxbury*, 24 Vt. 168; *Barton and Wife v. Montpelier*, 30 Vt. 650; See also, Angell on Highways, §§ 259, 261, 262; *Winship v. Enfield*, 42 N. H. 197;

*Chamberlin v. Enfield*, 43 N. H. 356; *Littleton v. Richardson*, 32 N. H. 59; *Dimmock v. Suffield*, 30 Conn. 129; *Keith v. Easton*, 2 Allen 552; *Kidder v. Dunstable*, 7 Gray 104; *Vinal v. Dorchester*, 7 Gray 421; *Howard v. N. Bridgewater*, 16 Pick. 189.

*J. Maeck and S. H. Davis*, for defendant, cited *Hixon v. Lovell*, 13 Gray 59; *Smith v. Wendell*, 7 Cush. 498; *Vinal v. Dorchester*, 7 Gray 421; *Shephardson v. Coleraine*, 13 Met. 55; *Howard v. N. Bridgewater*, 16 Pick. 9, 189; *Kellogg v. Northampton*, 4 Gray 65; *Davis v. Dudley*, 4 Allen 557; *Marble v. Worcester*, 4 Gray 395; *Dickey v. M. Tel. Co.*, 46 Maine 483; *Farnham v. Concord*, 2 N. H. 393; *Holley v. W. T. P. Co.*, 1 Aikin 74; *Glidden v. Reading*, 39 Vt.; *Cassidy v. Stockbridge*, 21 Vt. 391; *Kelsey v. Glover*, 15 Vt.; *Sessions v. Newport*, 23 Vt. 708; *Kingsbury v. Dedham*, 7 Am. Law Reg. 61; *Felch v. Gilman*, 22 Vt. 38; *People v. Utica J. Co.*, 15 Johns. 358; *Griswold v. Nat. Ins. Co.*, 3 Cowen 89.

STEELE, J.—This cause has been three times argued. We understand from the case, as well as from the statement of the defendants' counsel at the first argument, that so far as the liability of the town might depend on the length of time that the bales of hay had been suffered to lie upon the highway, or upon proper notice to the town officers that they were there, the rulings of the County Court were such that the defendants took no exception. The case, therefore, stands in this court on precisely the same ground that it would if it were conceded that the hay, which had been unlawfully deposited by the railway company upon the margin of the public highway, had been suffered to remain there an unreasonable time with the full knowledge of the officers of the town. No question arises in this court upon the plaintiffs' prudence. The only exception reserved is made to the *pro forma* ruling of the County Court, that even though the surface and width of the travelled track were faultless, and the bales of hay were outside that track upon the highway margin, still the town would—"the case in all other respects being made out"—be liable if the bales of hay "*presented such an appearance that they might reasonably be expected to, and naturally would, frighten ordinary horses,*" and the injury happened by reason of the plaintiffs' horse taking fright at them. The points relied on by the defence are, first, that the bales of hay were upon the margin of the road;

and, secondly, that the accident was occasioned by fright at them and not by collision with them. The case fairly presents the mere question, whether towns owe a statutory duty to travellers, for the breach of which the party suffering special damage may maintain an action, to remove from the margins of their highways objects unlawfully deposited there, which, by their frightful appearance, make it unsafe to travel the road with ordinary horses?

I. Does the fact that the hay lay upon the margin instead of the path of the highway alter the rule of liability?

If a town may be liable for a failure to remove an object unlawfully deposited upon the travelled track, *for the reason* that it obstructs travel by its frightful appearance, and thus renders the road unsafe, they must be equally liable when the object lies upon the margin, and naturally produces—as the jury under the charge have found it did in this case—precisely the same result. The result produced is, that the wrought path cannot be safely used by travellers. The cause which produces the result is an unlawful deposit of private property within the lines of the highway under the control of the town. If towns are bound to regulate their conduct with any reference to security from fright, less cannot be required of them than the removal of such obstructions as were complained of in this case, from any part of the highway, when their effect is to make the whole of it unsafe. This, of course, is said with the qualification that the duty does not attach until the town know of the obstruction, or ought to know of it. Nor would it attach while the property is lying upon the highway a reasonable time in loading or unloading, or for the ordinary purposes of transportation. It is true that towns are not bound, where it is unnecessary, to work the whole width of the highway, and if a traveller voluntarily leaves the path to travel upon the margin, he does so at his own risk: *Rice v. Montpelier*, 19 Vt. 470. But towns have a right to control the whole width of the road, and they have a corresponding duty. It is not necessarily a good defence to a claim for damages that they were incurred by reason of an obstruction upon the margin. On the contrary, it is well settled that it is the duty of towns to forbid and prevent the use of their highway margins as places of deposit for private property, whether it be lumber, shingles, logs, or other matter that may interfere with travel; and if they do negligently suffer the margins of their roads to become and remain unsafe by being thus

encumbered, the party who, without fault on his part, meets with an accident by driving against them, may recover of the town. Among the numerous cases recognising this doctrine are *Cassidy v. Stockbridge*, 21 Vt. 391; *Snow v. Adams*, 1 Cush. 443.

Nor does it alter the case that the party injured may sustain an action against the person who placed the nuisance upon the highway. It is the right of the party to proceed against the town if they are in fault, and the town may, if held to damages, look to the individual who obstructed the highway. See *Newbury v. Pass. R. R. Co.*, 25 Vt. 377, and *Willard v. Newbury*, 22 Id. 458. Assuming, then, that towns by such a neglect may become, as has always been held, liable to travellers who from some unforeseen cause, not their own fault, diverge from the travelled track and meet with damage by collision with the obstruction, it follows that towns would still more clearly be liable when such objects occasion damage to the traveller who does not diverge from the accustomed path but uses the road in the ordinary manner, *provided* towns may be liable at all for an injury occasioned by fright. When the margin of the highway is encumbered by an obstruction, and the obstruction is frightful in its appearance, only the exceptional individual who leaves the path incurs the danger of accident by collision, while everybody who travels any part of the road confronts the danger of accident by fright. It is very manifest that the error of the County Court, if any, does not lie in the fact that the hay was upon the margin instead of the travelled path. The question must simplify itself to an inquiry whether a town may be liable for such accidents by fright as are the natural consequence of the obstruction they suffer to remain on the road.

II. In examining this second question—whether towns are bound to remove obstructions deposited upon their roads when their natural operation is to occasion accidents by fright in using ordinary horses—we must, as in all questions upon a statutory liability, have recourse to the statute and gather its meaning, as we can, from its language, its reason, and purpose; from the light shed upon it by the other statutory provisions relating to the same general subject, and by the judicial interpretation it has received. The statute in terms requires towns to *keep* their highways in “good and sufficient repair,” and makes them liable for special damages sustained by reason of their “insufficiency or want of

repair." This language is quite broad enough to cover a case where a road cannot safely be travelled with ordinary horses. A statute, however, should not always be interpreted literally. It is often and properly said that this statute is not intended to impose an absolute liability upon towns for every insufficiency. They are only required to do what is practicable to be done to provide and preserve a condition of reasonable safety in their roads with reference to the amount and kind of travel they accommodate: *Prindle v. Fletcher*, 39 Vt. 255. But, it can hardly be said that a road in which obstructions are suffered to be placed and remain, which by their appearance are calculated to frighten ordinary horses, is in a condition of reasonable safety for travel of any ordinary kind or amount. Nor is it impracticable to prevent the continuance of such an obstruction. It is well understood that the duty of the town is not limited to the furnishing of a proper width and smoothness of path. The cases are numerous where towns have been held liable for not erecting proper muniments or barriers to protect travellers from accidentally going out of the road. See *Glidden v. Reading*, 38 Vt. 52. So, too, in a late case, a town was held liable in Massachusetts for damages from the falling of an unsafe awning which was so built as to extend over the road and endanger the travel which passed under it: *Day v. Milford*, 5 Allen 98. The purpose of the statute is to secure to the public safe highways. That purpose may be as effectually defeated by an obstruction which impedes travel by its frightful appearance as by one which, if it is hit, will be an obstacle to the secure passage of the wheels of a carriage. The land taken for the highway is taken for the public use as a highway. The statute has armed the towns with full authority to interfere with the appropriation of it to any private use inconsistent with an unembarrassed enjoyment of the public easement. It provides that if any person "shall erect any encroachment, or make any obstruction, or put any nuisance upon any highway," the selectmen may command or cause its removal. It also provides that no person shall "wilfully fell any trees, lay any timber, or place any obstruction or other nuisance so as to obstruct, hinder, or impede the passing in such highway," without being liable to a fine, and also to the payment to the town, or to any individual, of any damages sustained by either: Gen. Stat. p. 204, 5, 6, §§ 66, 69, 71. These statutes, which are a part

of the General Highway Law, shed some light upon the question of the extent of responsibility intended to be imposed upon towns with relation to their roads. It is beyond doubt that the placing of an obstruction upon a public way, which, by its frightful appearance or otherwise, would "hinder and impede passing," might subject the party who made the obstruction to fine and damages, and, if continued, might subject the town to indictment or to damages if the cause of an accident by collision. It is not easy to see the ground upon which the town should be entirely exempted from liability for the other and natural consequence of the obstruction—an accident by fright. In *Kelsey v. Glover*, 15 Vt. 708, the town was held liable for an obstruction because it was naturally calculated to, and actually did, add to the dangerous consequences of the accident from fright. Would the town have escaped liability if the obstruction by its natural operation had caused the fright instead of merely adding to its evil results? In many of the cases towns are held liable, although some accident, not the fault of the plaintiff or the defendant, contributes to the accident complained of. See *Hunt v. Pownal*, 9 Vt. 411. A town may reasonably be held to a higher responsibility, after notice, with reference to the removal of obstructions made by private property, unlawfully deposited upon the road—a duty easily performed and under the statute at the expense of the party who caused the obstruction—than with reference to the removal of equally dangerous obstructions which either exist naturally in the soil or are cast upon the margin in the process of working the road, which to a reasonable extent is a legitimate use of the margin. The traveller has reason to expect that the highway will have the ordinary and reasonable encumbrances which arise from the nature of the soil and country, and its being worked and repaired in a proper manner; but he has no reason to apprehend that the town has suffered these dangers to be increased by allowing the land taken for public use to become unlawfully appropriated to private uses as a place of deposit for property which will in any manner obstruct or impede travel, whether by frightening his horse or clogging his wheels.

The recent decisions of the courts of Massachusetts, for the learning and ability of which we have great respect, tend to a different result from the one reached by us: *Keith v. Easton*, 2 Allen 552; *Kingsbury v. Dedham*, 13 Id. 186; *Cook v. Charles-*



town, Id. 190-1 n. These cases are strongly relied on by the defence, and we have on account of their authority given the case before us a more extended examination than we otherwise should. But it is to be noticed, that at least two of these cases present such a state of facts as not necessarily to fall within the operation of the rules, which we think should govern this case. The daguerrean saloon, which stood upon a carriage by the roadside, in the case of *Keith v. Easton*, was, manifestly, not an object "which might reasonably be expected to frighten ordinary horses;" and the fluttering of loose canvass upon its roof was not the natural operation to be expected from the object. The pile of gravel fifteen inches high, complained of in *Kingsbury v. Dedham*, was that day lawfully and properly placed upon the road, to be spread over its surface in the ordinary course of repairs. It may be questioned how far the reasoning of the court, and it is upon this that the defendants here rely, would in Massachusetts be an authority, in a case presenting different elements of fact. It is doubtful whether the injuries for which towns may be held, can be satisfactorily classified and defined. Each case should stand upon its own facts. The note of the third case, *Cook v. Charlestown*, does not state whether the defendants had notice of the obstruction, and the opinion of the court is not reported. It is not, therefore, certain, from the report, that the court there held that, if the dead horse had been negligently suffered by the defendants, after notice, to lie in the street, the defendants would be exempted from liability for an accident which naturally resulted from the obstruction, simply because it was occasioned by fright instead of collision. If, however, such was the decision, the case is as strongly in point for the defendants as any case can be. Such an object as a dead horse in a street, would almost inevitably occasion accidents by fright, and would far more endanger and obstruct travel, by its tendency to frighten horses, than by its likelihood to disturb the passage of wheels by collision. In *Lund v. Tyngsborough*, 11 Cush. 563, though a new trial was granted, it was held that the plaintiff might recover without proving actual contact with the defect, and although the fright of the horse contributed to the accident; but the recent decision of *Horton v. Taunton*, 97 Mass. 266, seems to have qualified this to some extent, for, if a town is not bound to guard against fright, they should not be against its consequences. It may be possible, that the courts of

Massachusetts have become more inclined to give the defendants, in these cases, the benefit of any doubt upon the meaning of the statute, from the fact that for a long time the action under their statute was substantially *penal* in its nature—the party injured recovering, if the town had notice of the defect, double damages: See Mass. Stat. of 1781, c. 81, § 7; Rev. Stat. Mass. 1836, c. 25, § 22. By their statute of 1850, c. 5, the recovery became limited to actual damages. The liability of towns for injuries by fright, occasioned by obstructions upon the highway margin, seems in New Hampshire to have been rather assumed as a matter of course, as an unquestionable proposition, than to have been decided as a debatable question of law: *Winship v. Enfield*, 42 N. H. 199, 200, 216; *Chamberlain v. Enfield*, 43 Id. 358–60; *Littleton v. Richardson*, 32 Id. 59. In all these cases, the injury occurred by fright at lumber placed upon the road, or its margin. In all of them, the *Nisi Prius* Court held that towns might be liable for damages incurred in that manner. In two of them a new trial was granted for other errors, but in all of them satisfaction was expressed with the ruling below in this respect, though it does not seem to have been questioned in argument. The case of *Dimock v. The Town of Suffield*, 30 Conn. 129, was an action for an injury received by the plaintiff's horses taking fright at some white plastering on the margin of the road, piled up, as the case finds, nearly to the height of the road-bed, but so as to be "in no manner an obstruction to the public travel, except so far as it might frighten horses." The point was distinctly made by the defendants, that the town could not be held liable for a defect of that nature. The court, in their opinion, delivered by HINMAN, C. J., say, that whether any duty devolved upon the town with reference to the pile of plastering, "depends upon whether it was in its general operation calculated to frighten horses of ordinary gentleness." He also adds: "There can be no doubt that a road may be rendered unsafe by objects upon it calculated to frighten animals;" but "whether a slight discoloration by the side of the road, such as was caused in this case by the plastering that lay there, was in fact an object calculated to frighten horses which are usually gentle, and therefore fit to be driven, is an entirely different question." It appeared in that case that the plaintiff's horse was shy and timid, and a decision against the plaintiff was advised, upon the ground that there was "heedlessness amounting to negligence

on the plaintiff's part, which was the cause of the injury, and that with the exercise of reasonable care he would have passed the object." It is also said by CARPENTER, J., in *Hewison v. New Haven*, 7 Am. Law Reg. 783, that "any object upon or near the travelled path, which in its nature is calculated to frighten horses of ordinary gentleness, being likely to obstruct the use of the way, may constitute a defect in the way itself." The statutes as well as the decisions of Connecticut and New Hampshire, relating to the responsibility of towns for injuries upon the highways, more closely resemble ours, than do those of Maine or Massachusetts. We think, that not only the language and purpose of our statutes, and the reason and spirit of our decisions, but also a proper regard to public policy, require us to hold that the defendant town is liable for the natural consequence to the plaintiffs, of a negligent failure to remove the obstruction unlawfully deposited in the highway, which "presented such an appearance, that it might reasonably be expected to, and naturally would, frighten ordinary horses." The expression of the court below, that towns are bound to remove from their roads *all* objects calculated to frighten ordinary horses would be open to criticism, if it stood alone. It was, however, necessarily limited and applied to the bales of hay complained of. No other obstruction was in proof, and the remark could not have misled the jury. The result is, the judgment of the County Court is affirmed.

WILSON, J., and PROUT, J., concurred. PIERPOINT, C. J., having presided in the court below, and PECK, J., being a tax-payer in the defendant town, did not sit; but after judgment they expressed their concurrence with the views stated in the opinion. KELLOGG, J., who was upon the bench, and heard the case when first argued, entertained the same views.

BARRETT, J., dissented.

We have read the foregoing opinion with more than common interest, because it discusses a point in the law, affecting the responsibility of towns for the condition of their highways, which is of great practical importance, as well to the towns as to the public at large, and in regard to which there seems, of late certainly, a tendency or disposition, in some quarters, to admit considerable relaxation of what has long been considered the established doctrine upon the subject. And we think it must be admitted that the opinion possesses two very essential merits, as a judicial declaration of the law; it follows the established principles of law upon the subject, both in that state and elsewhere, and

defines a course of action and responsibility, which is, at the same time, both safe and intelligible, as well for towns as for travellers upon the highways.

There are two motives which seem to us to have combined to unsettle the law upon this particular question, the responsibility of towns for objects carelessly suffered to remain within the limits of the travelled portion of the highway, calculated to frighten quiet, or ordinarily quiet, and gentle horses: that is, (1) a timid apprehension that towns may thereby become responsible for unreasonable watchfulness, and even ludicrous obstructions to quiet travelling; and also, (2) in some instances, perhaps, a feeling of love of discovery of some good mode of escape from the embarrassing dilemma.

It cannot be denied that both these motives are laudable, and entirely consistent with a high degree of ability and fitness for the wise and judicious administration of justice: but at the same time it is undeniable that they have both contributed largely to the production of bad law, and have produced more erroneous decisions than they have ever cured, in a tenfold proportion.

The case of *Chamberlain v. Enfield*, 43 N. H. 356, seems to us to place the question upon its true basis, that it must be regarded as a question of fact for the jury, whether an object outside of the travelled portion of the highway is a defect or obstruction to its safe use, by reason of its liability to frighten horses. There is no valid reason apparent to us why this question may not as safely be intrusted to juries under proper limitations, to be defined and fixed by the courts, as any other questions of fact arising in this class of cases.

There is no question that as the responsibility of towns in such cases is exclusively a statutory one, the courts are bound to a reasonably strict construction in regard to its extent. But

at the same time it should not be so much restricted as to fail reasonably to secure its object, the maintaining of a safe transit for travelling along the highway. For, notwithstanding some variation in the statutes of the different states, all substantially agree in requiring the municipality to provide and maintain a safe and convenient passage for travellers. This unquestionably primarily applies to the travelled portion of the highway. So that one who for mere convenience, and without actual necessity, departs from the travelled portion of the highway, cannot recover for any injury he may sustain thereby, in consequence of obstructions to passage. Such obstructions are not required to be removed from any portion of the laid out highway except that which is prepared for the passage of travellers, as the English call it, the "metalled" portion of the highway.

But it would be a very imperfect view of the subject to conclude that this portion of the highway is all that towns are bound to look after. If that were so, there would be no necessity for taking and no power to take more land for the use of the highway than is reasonably necessary for making the travelled path. And although it might require the use of the adjacent land, to some extent, in the course of construction and repair, that, being a temporary use, would not require the taking of the land. And, therefore, where towns are allowed to take for the highway from three to six rods in width through its whole extent, it must be concluded that something more is expected than a mere track of sufficient breadth to enable carriages to pass each other. It was no doubt intended to guard against intrusion from the adjoining landowners, and thus protect the traveller, to a reasonable extent, against such sights and noises as might render the passing along the highway embarrassing or impossible. And al-

though it is not possible to guard against all occurrences calculated to frighten teams, this is no reason why the towns and cities should not be responsible for putting, or allowing others to put, the margins of the highway to such uses, more or less permanent, as will discommodate or destroy the safe and comfortable use of the travelled portion of the same. For if the margins of the highway may lawfully be put to any and all uses known to modern advancement in manufactures by machinery, there are few horses of such quiet demeanor that they could be trusted to carry a vehicle safely through its clamor and exhibition.

The truth is, no such thing was ever expected or would be for a moment tolerated. No such thing is claimed. But it seems to be supposed by some that while all such operations along the sides of the travelled path in highways are clearly nuisances, and so abatable by the municipal authority, still the traveller has no claim for damages sustained by reason of that acknowledged municipal duty being omitted.

It may be true that some of the statutory provisions in the different states are so defectively drawn as to produce this anomalous result, that while the traveller, without fault on his part, suffers pecuniary damage by reason of the omission of the municipalities to perform their duty in regard to the highways, he is without redress. But it is safe to conclude no such result was intended to follow from the provisions of the statute, and none such should be invited by the courts, on the ground of mere construction. It could only be tolerated upon the ground of strict necessity, as the inevitable result of some defect in the language of such statutes.

There may possibly be some difficulty in defining the precise limits of municipal responsibility for not removing obstructions to the safe use of the highway, when such obstructions do not

come within the limits of the travelled path. There would be the greatest embarrassment in laying down any rule of law that would apply with precision to each particular case as it should occur. That would manifestly be impracticable. But it would in our apprehension be a very lame conclusion to make from this acknowledged difficulty, that no obligation could safely be imposed upon the municipalities in regard to such obstructions to safe travelling. The same difficulties exist upon all questions of negligence and duty, until by repeated trials some definite rule is established. It was so in regard to accidental obstructions in the travelled path, until the statute interposed and fixed the time for removal at twenty-four hours. It was so in regard to demand and notice upon negotiable paper, until the convenience of commercial usage fixed the time at one day for each successive endorser to notify his next guarantor.

And with all due submission it has never seemed to us that the argument *ab inconvenienti* or the *reductio ad absurdum*, which is so much resorted to in these cases, was at all satisfactory or conclusive. Because it is not possible to remove all objects which tend to frighten animals passing along the highway, is that any sound reason why one manifestly of that character, and clearly there by intrusion, should not be removed? And if not, can any good reason be assigned why the municipalities should not be held responsible to travellers for damage resulting from their culpable negligence in not removing the same? Where, therefore, the judge gravely tells the traveller that if his horse is frightened at the sudden appearance of the full moon, or the bursting of a clap of thunder, he is remediless, will it be likely to afford him much of the spirit of acquiescence in the wisdom of the law for allowing a threshing-machine or a windmill to be permanently operated within

the limits of the highway? The passing of a flock of wild geese so near the ground as to cause a whirr and a rush of air, might possibly frighten some brute animals, or some not entirely so; but to be told that there is no relief, would be but poor consolation, when the man is complaining of a menagerie having taken permanent possession of the highway and thus driving his team mad. It is always possible to put extreme cases, where the traveller might suffer the same damage and be wholly remediless. But unless they are more analogous, in principle, than some which have been called in to foreclose the discussion on this question, there would be slight relief given.

If towns may render the highways unsafe for ordinary use by travellers by the bewildering sights and noises publicly and permanently tolerated upon their margins, there will be slight benefit in having any such margins, or, indeed, in having any highways at all. The case of *Drake v. Lowell*, 13 Met. 222, clearly recognises the principle for which we contend. And we do not so much object to the more recent cases in Massachusetts, where this rule is attempted to be restricted within narrower limits. The case of *Hixon v. Lowell*, 13 Gray 59, where towns and cities were held not responsible for damage resulting from ice and snow falling from the roofs of buildings adjoining the streets, is unquestionably sound, as a general rule. There might possibly occur an exceptional case, where the town or city might be required to remove a mass of overhanging ice or snow, more obstructing to the safe use of the highway than any such ice or snow would be if actually fallen upon the track. It might present a case for the jury, as in *Luther v. Worcester*, 97 Mass. 268. But in such case, it might be regarded mere foolhardiness for the traveller to venture upon such imminent peril, and so preclude a re-

covery on that ground. But clearly highway travellers are not bound to watch the snow and ice upon the roofs of buildings adjoining the highways. And in *Keith v. Easton*, 2 Allen 552, where the town was held not responsible for the result of fright to horses caused by a daguerrean saloon along the margin of the highway, the decision may be sound, but we should have deemed it a case of such doubt as to be submitted to a jury, as was done in the principal case. We trust the courts will not be so much alarmed at the outcry against juries in finding towns responsible for damage to travellers upon the highway, as to adopt constructions virtually repealing the statutes affording redress in such cases, for the remedy is needed, and jurors, if properly instructed by the courts, will be sure to render safe verdicts.

Since preparing the foregoing we are gratified to learn that the Supreme Judicial Court of New Hampshire, in the case of *Bartlett v. Hookssett*, 47 N. H., have sustained the same view for which we contend, in opposition to that adopted in Massachusetts in the cases already referred to, and the later ones of *Kingsbury v. Dedham*, 13 Allen 186, and *Cook v. Charlestown*, Id. 190, in note. The point ruled in the New Hampshire case was, that objects suffered to remain resting upon one spot, or confined within one particular space within the highway, if they are of such a shape or character as to be manifestly likely to frighten horses of ordinary gentleness, constitute "obstructions" or "insufficiencies," for which the town is liable. The obstruction here was a pigsty projecting into the highway and occupied by five swine, the declaration alleging that the horse was frightened by the swine "starting and running about," and by certain loud noises which the swine then and there uttered.

It is not improper, we trust, for us to

say that this adherence to the former rule upon this important subject, by a court of so much weight of authority, is gratifying upon more than one account. It gives hope that the frequency of this class of actions and the tendency with juries to hold the municipalities responsible, will not have the effect to lead all courts to so far restrict the extent of that responsibility by constructions as to virtually destroy the beneficial effects of the statutes upon the subject. And we trust it may not be regarded as entirely inadmissible to say that it affords great support to one travelling down the western declivity of life to find some assurances, as he passes along, that all the lights of his life have not become extinguished before he reaches his journey's end.

I. F. R.

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*Supreme Court of New Jersey.*

WILLIAM J. LYND v. GEORGE MENZIES, JOHN H. SUYDAM, AND OTHERS.<sup>1</sup>

A minister of the Protestant Episcopal Church has either the possession of the church edifice or a right in the nature of an easement to enter therein, on all occasions set apart in the parish for divine services, and a substantial interference with such right will lay the ground for an action at law.

The English ecclesiastical law forms the basis of the law regulating the affairs of this denomination of Christians.

In order to vest the pastor with the ordinary rights in the temporalities pertaining to his office it is not necessary for the congregation to be incorporated, nor that the title to the church should be lodged in such congregation.

A Protestant Episcopal minister was barred out of the church building on a Sunday, by his wardens and vestrymen: *Held*, that a verdict for substantial damages for such act, in a suit by the minister, should not be disturbed.

THIS was an action on the case for forcibly preventing a minister from preaching in the church and occupying the parochial school-house. Upon the trial the following facts were elicited: By a deed dated 1st October 1853, Cyrus Peck and wife conveyed the lot upon which the church and school-house are now erected, to the Rectors, Wardens, and Vestrymen of the Church of St. Barnabas, Roseville, in the city of Newark, in fee, upon the condition that a church and school-house should be erected thereon, and which church edifice should be consecrated, appropriated, and devoted for ever exclusively to the service of Almighty God, according to the doctrine, discipline, and worship of the Protestant Episcopal Church in the United States of America. At the time

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<sup>1</sup> We are indebted for this case to Charles Borchertling, Jr., Esq., plaintiff's counsel.—EDS. AM. LAW REG.

of this conveyance the said church was not incorporated, and did not become so until after the expulsion of the minister, as herein-after stated.

On the 23d July, 1855, this church was consecrated by the bishop of the diocese of New Jersey, and from that time forward the congregation continued its organization. In December, 1861, the plaintiff accepted a call to the rectorship of this church, and in the month of June, 1862, was duly instituted. It appeared that the plaintiff, in common with the other officers of the church, supposed the church had been incorporated and that various corporate acts were performed. Before his call, the church had claimed and been conceded ecclesiastical rights which pertained to incorporated churches only; after the call of the plaintiff, a school-house was put up on the church lot, and he was placed in possession. On the 27th April, 1867, the plaintiff received a note from two of the defendants, who were the wardens of the church, notifying him that, on Easter Day, which was then passed, his connection as rector with the church had ceased. On the next day, which was Sunday, when the plaintiff went to the church to officiate he found the church closed, the doors being fastened, so as to prevent his entering. In a few days afterwards he was in a similar manner excluded from the school-house. It was proved that such expulsions were the acts of the defendants, two of whom were wardens and the others vestrymen of the church. The question of law as to the right of the plaintiff to recover was reserved, and the matter of damages submitted to the jury, who returned a verdict for \$1000.

The case came before this court on a motion for a new trial.

*C. Parker and Charles Borchertling, Jr., for plaintiff.*

*Joseph P. Bradley, for defendants.*

BEASLEY, C. J.—The motion for a new trial in this case is rested on two grounds, viz.: first, that the proofs will not sustain an action at law; second, that the damages are excessive.

On the first of these heads the ground taken is, that at the time when the plaintiff became the rector of this congregation, and also at the time of the transaction complained of, the congregation was not incorporated. From this fact it was urged that the title under the deed from Mr. Peck could not pass out of him for the



want of a competent grantee to take it, and that the members of the congregation were in possession of these premises as tenants in common by sufferance, and that, consequently, such rights in the realty as ordinarily pass to the rector under a regular organization, did not in the present case vest.

So far as the law has to do with the relationship of the rector with his flock, such relationship is to be regarded as the effect of a contract.

What then is the agreement into which a congregation of this denomination of Christians enters upon the call of a rector? So far as touches the matter in controversy, it plainly appears to be this: They offer to the minister receiving the call such rights in their temporalities as by the ecclesiastical law of their sect belong to the office which is tendered, one of such rights being that of preaching on Sundays in the church provided by the congregation. Such an offer, therefore, can have nothing to do with the title to the church edifice. No matter in whom the title may reside, if the congregation has the use of the building, the rector must of necessity have the right to partake in such use. The agreement is not, as the argument on the part of the defendants assumed, that the rector is to possess this class of privileges in these temporalities of which the congregation is the absolute owner. But to the contrary, whatever place the congregation provide for the purpose of public worship in the parish, into such place the rector, by virtue of his office, has the right to enter in order to conduct such worship. I have failed, therefore, to perceive how the fact of title to the church premises in question is to affect the legal result in this case; in the view which I take of the understanding between these parties, it cannot matter at all whether or not the congregation had any interest in these premises other than a right to the occupation of them for the purpose of Divine service on the Sunday of the expulsion; because, if on that occasion this building was the place set apart by the congregation for their religious exercises, then it necessarily follows that the plaintiff at that time, *virtute officii*, had the legal right to be present and to conduct the worship. But the case in reality is much stronger in favor of the plaintiff than this. This church property was put into the possession of this congregation for their denominational uses by Mr. Peck, the owner of the fee; they had erected their church upon it, and thus complied with the conditions of the grant; it is true

the title at law was defective, but it is also true that their title in equity was complete. This church, thus built, had been consecrated by the bishop of the diocese, and by institution, performed with all due ecclesiastical formalities, the plaintiff had been placed in charge of the spiritual affairs of the church; the congregation remained in full possession of the church edifice, and neither Mr. Peck nor any one else called such possession in question. Under the circumstances, how is it possible that these defendants, who claim to be the representatives of the congregation, can deny the rights of the rector as to these premises on the ground of the inferiority of their own title? Suppose we regard them as mere tenants at sufferance, will that fact enable them to put an end to the rights of the plaintiff in this property? If such were their position, the only effect would be to make both their own rights and those of the rector dependent on the will of the owner of the land. But it certainly would be contrary to all principle to permit a party in possession of real property to grant an interest in it to another, and then defeat such interest on the ground of his own inability to make such grant. The rule that a party cannot derogate from his own grant is one of universal efficacy, and applies in a very direct manner to the present case; nor is there anything in the suggestion that the usual rights touching the temporalities which vest in the rector, could not be obtained by him in the present instance, on account of the imperfection of the ecclesiastical organization of this congregation; the imperfection relied on was the absence of an incorporation. But the want of this quality does not at all affect the rights and duties of pastor and people towards each other; the effect of becoming incorporated is to facilitate the acquisition and transfer of property, and to enable the congregation to be represented in the convention of the diocese: Article V. of Constitution of P. E. C. of Diocese of New Jersey. But, by the canonical law of this denomination of Christians, it is not necessary, in order to constitute a church, that the congregation should take the form of an incorporated body. Indeed, the very law of this state, which provides for the incorporation of this class of churches, presupposes, and requires, that there shall be antecedent to the inception of proceedings "a congregation of the Protestant Episcopal Church in this state duly organized, according to the constitution and usages of said church:" Act of 1829. In the case now before us, it plainly

appears that this church was constituted in conformity to the ecclesiastical law and usages applicable to it; and the consequence is, that the plaintiff, by his official connection with it, acquired all the customary powers and privileges pertaining to the rectorship.

But there was a second objection taken on the argument, which was, that on the assumption of the existence of the right of the rector to the privileges claimed by him, still it was said, an innovation or disturbance of such rights would not constitute the ground of a suit at law.

I cannot yield my assent to this proposition. The nature of the right in question forbids such a result. I think it is clear that, in right of his office, a rector, by force of the law of this church, has either the possession of the church edifice, or has a privilege which enables him to enter into it—such privilege being in the nature of an easement. Mr. Murray Hoffman, in his learned and interesting treatise on the law of the Protestant Episcopal Church in the United States, page 266, in remarking on the effect of the incorporation of churches, states his views in these terms, viz.: “The title then to the church and all church property is in the trustees, collectively, for all corporate purposes; but there is another class of purposes purely ecclesiastical, as to which the statute did not mean to interfere or prescribe any rule. These are to be controlled by the law of the church.” And the conclusion to which he comes is thus stated: “That the control and possession of the church edifice upon Sundays, and at all times when open for divine services, appertains exclusively to the rector.” I have no doubt with regard to the correctness of this view. By the English ecclesiastical law, which, although somewhat modified by new circumstances and by American usages and statutes, constitutes the substantial basis of the law controlling the affairs of this particular church, the possession of the church and churchyard is in the incumbent; nor does it make any difference in this respect in whose hands the title to the religious property is lodged, as for example, in case the freehold of the church and churchyard is in the rector, nevertheless, the curate will be deemed in possession for all ecclesiastical purposes. In exemplification of this rule, I refer to an interesting discussion of the question in *Greenslade v. Darby*, decided during the present year by the Court of Queen’s Bench, Law Rep. 3 Q. B. 421. “I quite agree

with the former decisions." Such is the declaration of Chief Justice COCKBURN, that an incumbent has possession of the churchyard as well as of the church for all spiritual purposes; therefore for burials, and for all purposes attached to his office, he has undoubtedly uncontrolled possession of the churchyard. To the same purpose is the rule laid down by Cripps in his treatise on the Church and Clergy, page 158; See, also, 1 Burn's Ecclesiastical Law 377; *Stocks v. Booth*, 1 T. R. 428. If, then, we adopt this theory, and I perceive no reason for rejecting it, that for the purpose of the exercise of his sacerdotal functions the rector becomes possessed of the church buildings and grounds, it will be difficult to devise any pretext in denial of the right of such officer to a civil remedy if such possession be invaded. Nor does the right to redress for an interference with his rights, seem less clear, if we adopt the hypothesis, that by force of his position the plaintiff was possessed of an easement in these premises. Such a privilege would not be unlike in kind to a right to the occupation of a pew in a church; and of this latter right in the case of *The Presbyterian Church v. Andruss*, 1 Zabriskie 328, Chief Justice GREEN remarks, it "is an incorporeal hereditament. It is in the nature of an easement, a right or privilege in the lands of another. For an interruption of this right, an action on the case for a disturbance, as in other cases of injury to incorporeal hereditaments, is the only remedy." Regarding, then, the rector's interest in the church edifice as a mere right to enter and while there to discharge certain functions, I am unable to distinguish it, in its substantial essence, from the right of the pewholder. The right of the latter is obviously no more secular in its character than the former; both the pewholder and the minister attend to the end of religious worship and edification, and as the pewholder has a remedy at law for a disturbance of his privilege, it would seem to be preposterous to deny it to a minister for a like wrong. Upon principle then, I think, the present action is to be vindicated, and for a precedent I refer to the case of *Phillybrowne v. Ryland*, 8 Mod. 352, 2 Strange 624, in which it was decided that an action would lie on behalf of a parish over against the clerk of the vestry, for shutting the vestry-door and keeping the plaintiff out, so that he could not come in to vote, the rule of decision in this case appears to be indistinguishable from that which is called for by the one now before us.

Adopting, therefore, either of the views above indicated, viz., that the plaintiff was in possession, or that he had a right to enter on special occasions, the interference with either of such interests affords a right of suit; the mere fact that the form of action would be variant if we adopt one or the other theory, cannot affect this case on the present motion, as the real question in controversy between the parties has been tried, and consequently by force of the provision of our present Practice Act, the mode of suit is now alterable, so as to conform to the legal view which the court may adopt.

Influenced by these considerations, I have concluded that the plaintiff's right of action is sustained by the proofs in the case.

On the second head my judgment is also in favor of the plaintiff; the damages are undoubtedly large, but this question was left fairly to the jury, and there is no reason to suppose that they were in any respect subjected to any sinister influence. The defendants acted with great indiscretion; their conduct was oppressive, and whatever their intentions may have been, it was calculated to wound and injure the plaintiff.

The verdict should not be disturbed.

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*United States Circuit Court, Southern District of Georgia.*

JOHN M. CUYLER v. JOHN C. FERRILL AND OTHERS.

A state court of Georgia during the late war had no jurisdiction to decree partition of lands in that state while one of the joint owners was a citizen and resident in one of the other states adhering to the Union.

The United States courts, therefore, will take cognisance of a bill for partition of such lands and disregard the previous judgment.

A purchaser at a judicial sale under the judgment of the state court who has paid only in Confederate notes cannot be regarded as a *bond fide* purchaser who has paid.

JOHN M. CUYLER, a citizen of Pennsylvania, filed his bill in chancery in this court for partition and relief against John C. Ferrill and others, citizens of Georgia.

Jeremiah Cuyler devised certain lots in Savannah to his daughters for and during their natural lives, and thereafter to his sons, John M. and Teleman Cuyler, their heirs and assigns. The bill set forth, that the life estate ceased in March 1863, and that the

property then vested, in fee, in John M. Cuyler and in the heirs of his brother Teleman, in undivided halves, Teleman having died intestate anterior to the termination of the life estate; that complainant has been informed that during the late civil war, when all communication was interrupted, some of said parties applied for a partition of said property, and under proceedings of which he knew nothing, to which he was not a party, and of which, at the time of filing the bill, he had no definite information, the said property was sold and purchased by John C. Ferrill aforesaid, who, as he has been informed, paid for the same in notes issued by the late Confederate Government; that if such proceedings were had, they were not binding on him; and, if intended to affect his rights, they were a fraud upon the same, and unlawful; and prayed for a commission to divide and allot the property, and for an account of the rents, income, and profits from the death of the last surviving daughter, on the — day of March 1863.

The answer of defendants, except Ferrill, admitted the facts set forth in the bill, and recited the proceedings for partition in the Superior Court of Chatham county, ending in the sale of the lots to Ferrill. The return of the commissioners to make partition set forth the sale and payment of one-half the proceeds to the heirs of Teleman Cuyler, and that they had a balance of \$17,033 remaining in their hands, "which, under the will of the said Jeremiah Cuyler, is devised to Dr. John M. Cuyler, a surgeon in the army of the United States. Of this amount, these commissioners, under the exigencies of the Currency Act of the Confederate States, have invested \$17,000 in 4 per cent. certificates, and have on hand \$33.01 in currency of the Confederate States, issued prior to the 17th February 1864." This return was included in the record of the proceedings for partition, all of which was made a part of the answer of these defendants.

Ferrill, in his answer, did not deny the facts as to the will and complainant's title under it, &c.; admitted the payment of the purchase-money in Confederate notes, but denied any fraud on the rights of complainant in the sale and purchase of the lots aforesaid, and insisted that as a fair and *bond fide* purchaser, for a valuable consideration, he had a full title to said lots of land in fee simple, and that no partition could be decreed by this court.

To these several answers complainant filed his replications.

*Mr. Fitch* and *Mr. Pope*, for complainant, cited and commented on Code, § 3922; 2 Spear 283; 6 Wend. 453; 5 Ga. 505; 7 Rich. Eq. 283; Story Eq. Pl. §§ 72, 82, 83; 1 Story Eq. Jur. § 556; 2 Atk. 380; 1 Story Eq. Jur. §§ 650, 651; 3 Br. Ch. 264; 1 Russ. & M. 284; 1 Sumner 504; 4 Dess. 287; 1 Speer's Eq. 542; Rice Eq. 340; 2 Sim. & Stu. 472; 4 Rich. Eq. 105; 2 Hill Ch. 367; 3 Atk. 304; Id. 814; Speir's Eq. 27; 4 Strob. Eq. R. 73, 74; 3 Atk. 124; 1 Story Eq. Jur. § 655; 5 Mad. Ch. n. 363; 8 Wheat. 1; 1 Kent 67; 7 Peters 586; 9 Cow. 573; *Ager v. Fairfax*, 17 Ves.

*Mr. Dougherty* and *Mr. Lloyd*, for defendants, cited and relied on 8 Cranch 4, 9; 1 Pick. 439; 2 Burr. 1009; 2 H. Blackstone 415; 1 Kelly 483; 2 Barb. Ch. 396; 3 Id. 608; 5 Id. 51; 9 Id. 516; Bunb. R. 322; 1 Johns. Ch. 111; 4 Barb. 493; Story Eq. Jur. § 646; 9 Cowen 546, 573; Rich. Eq. R. 84; 2 Barb. 398; Code of Georgia.

ERSKINE, J.—(After stating the facts.)—The proceedings relied upon by the contesting defendant, Ferrill, in bar of the present suit for partition, were had, as it seems, under the Code of Georgia, §§ 3896 to 3907, inclusive. These sections provide, among other things, here unnecessary to mention, that if the party called upon to answer the application for partition be absent from the state, or has not been notified, he must, within twelve months after the rendition of the judgment, move the court to set it aside, or he will be concluded. "But in no event shall subsequent proceedings affect the title of a *bonâ fide* purchaser under a sale ordered by the court:" Code, § 3907.

The property, as already noted, was sold in the summer of 1863, and the bill was filed in this court in the winter of 1867, nearly four years thereafter. But from the view which I entertain of this suit, the Statute of Limitations invoked is not a point for decision.

Among other defences, Ferrill assumed the position that if there was any irregularity in the proceedings of 1863, complainant must address himself to the Superior Court of Chatham county, that court alone having jurisdiction of the matter under the statutes of Georgia. And that view must be deemed correct unless there be circumstances peculiar to the alleged proceedings for the

partition—which contravene some governing principle or policy of the common or positive law.

Another position taken by him was that he is a fair and *bond fide* purchaser for value of the entire property, at a judicial sale, and, therefore, that no partition can be made by this court.

If this argument is sound, then the complainant must go elsewhere to seek redress; for this court has no jurisdiction except what is bestowed by the National Constitution and the laws of Congress enacted in pursuance thereof. This defence appears to be founded upon the concluding sentence of section 3907 of the Code, but the defence is not, in my judgment, proved by the evidence. To entitle Ferrill to the benefit of it (supposing the proceedings and sale to have been legal), the purchase-money—the \$36,000—must have been paid in money; whereas the proof is that it was paid in “Confederate notes:” *Boone v. Chiles*, 10 Peters 177.

Here it may be observed, that it was fully discussed at the hearing, whether the defence of *bond fide* purchaser can avail against a legal title; but the question seems not to be material to the determination of this cause.

If Ferrill is to be treated as a purchaser, it must be in a very limited sense of the term; he cannot be recognised as a purchaser who has paid, but as one still indebted; as, for example, a defendant in *feri facias* would be after payment to the marshal in a worthless or depreciated currency: *Griffin v. Thompson*, 2 How. 244; *Buckhannon v. Tinnin*, Id. 258. See also 3 Id. 707. Therefore, if the court could abstain from making partition, it would do so on terms, and these terms will necessarily be, that Ferrill, as purchaser, pay to complainant his share—being one-half of the purchase-money in legal tender notes, with interest. And even if the court should ultimately so decree, it would not go so far as to accept such performance in lieu of partition until after a return of the commissioners of this court, and not then unless by mutual consent of the parties; or, as the last resort, in case equity cannot otherwise be done.

Notwithstanding the contentment of those defendants who received and accepted payment of their respective shares in Confederate currency, or notes from their co-defendant Ferrill, under the authority and direction of their freely-chosen agent, still my mind fails to comprehend the process of reasoning by which it



can be inferred, from such receipt and acceptance, that the rights of the complainant in this bill are in anywise affected, unless he was a party to the transaction, or the tribunal which rendered the judgment had judicial cognisance of the cause.

This court, in *Williamson v. Richardson*, April Term 1867, and the United States District Court for the Northern District of Georgia, in *Dean v. Harvey*, July 1867; and the same court, in *Bailey, Trustee, v. Milner*, 7 Am. Law Reg. 371, s. c. 2 Bleckley R. 330 (35th Ga.), ruled, that where parties, inhabitants of this state, had, during the rebellion, sold or otherwise disposed of their property for Confederate notes, and accepted them in payment or exchange for it;—where such transaction was fully executed, and free from fraud, covin, misrepresentation, and undue influence,—the United States Courts for the state of Georgia would not, unless otherwise instructed by the Supreme Court of the nation, lend their aid to disturb or to set aside those acts, but would suffer them to remain entombed, and leave also the parties to their repose, where they had voluntarily placed themselves: *Tolber v. Armstrong*, 4 Wash. 296; *Planche v. Fletcher*, 1 Doug. 551; *Bonch v. Lawson*, Cas. Temp. Hardwicke, Lond. ed. 85, 89, 184.

The owner of property may dispose of it for what he pleases, or even give it away. But this court cannot recognise Confederate notes, or, as they are more commonly called, "Confederate Treasury Notes," as money or other thing of value.

And in *Bailey v. Milner, supra*, it was said by the court that these notes "were issued by a pretended government, organized in the name of certain states, by subjects and citizens of the United States, and who, at the very time, were in rebellion against their rightful government, and whose object and design was to 'dismember and destroy it:.'" *The Prize Cases*, 2 Black 635.

Ferrill has made the record of the proceedings of 1863, and also the deed of conveyance, a part of his answer, and having adopted this mode of defence, he is bound by it, for he cannot contradict that which he has pleaded as a record, nor gainsay the conveyance or the recitals therein, and each shows that he had notice of the claim of complainant to a moiety of the property: *Bowman v. Taylor*, Scott 210; *Van Ransselaer v. Kearney*, 11 How. 297; *Bush v. Ware*, 15 Peters 93. And where a party

has knowledge of the facts, he has notice of the legal consequence resulting from those facts.

In the argument in behalf of Ferrill, it was said by one of his counsel, that the Superior Court of Chatham county had jurisdiction of the subject-matter, and of all the parties in interest, and its judgment, even if erroneous, cannot be attacked collaterally; citing and commenting on *Griffith v. Frazier*, 8 Cranch 9; 1 Pick. 439; 2 Burr. 1009; 2 H. Bla. 415; 1 Kelly 487; 23 Ga. 186.

If the tribunal which entertained the proceedings for partition really possessed the powers ascribed to it by counsel, then the authorities quoted are apposite, and its judgment cannot be assailed collaterally. But if it had not such jurisdiction, then the judgment, so far at least as the rights of the complainant are involved (for I am not called on to notice any jurisdictional question which might, under other circumstances, affect those who applied for partition in 1863), is null and void.

And here the inquiry necessarily arises, had the court jurisdiction of the subject-matter of the judgment?

The national legal tribunals take judicial notice of the general enactments of the Congress of the United States, and the duly promulgated proclamations of the President thereof.

The late civil war being matter of public history—a fact impressed upon the whole country—is likewise judicially known to the courts. And from this general historical fact, they will also take judicial notice of particular acts which led to it, or happened during its continuance, whenever it becomes essential to the ends of justice to do so.

On the 19th of April 1861, proclamation of blockade was made by the President. This, of itself, was conclusive evidence that a state of war existed: *The Prize Cases*, 2 Black 635. Congress, on the 13th of July, in the same year, passed a law authorizing the President to interdict all trade and intercourse between the citizens of the states in rebellion and the rest of the United States. On the 16th of August following, he proclaimed the inhabitants of the revolted states, including Georgia, in insurrection; excepting, however, certain named localities. And on the 2d of April 1863, he reproclaimed them in insurrection; revoking the previous exceptions, but again making others. No part of Georgia fell within any of the exceptions. Congress by a joint

resolution, on the 8th of February 1865, declared that "the inhabitants and local authorities" of Georgia and ten other states "rebelled against the government of the United States, and were in such condition on the 8th of November 1864:" 12 Stat. 1262; 257; 13 Id. 731; 567.

In *Bailey, Trustee, v. Milner, supra*, the court said: "During the latter part of the year 1860 and the early part of 1861, South Carolina, Georgia, Louisiana, Virginia, and other states, by similar modes, called on the people to send delegates to meet in convention. Accordingly the conventions assembled, and each passed an ordinance of secession, as it is generally termed, by which ceremony these conventions severally adventured to withdraw the states from the Federal Union, and to release the people from their subjection to the laws of the land, and their allegiance to the nation. The constitutional state governments were overthrown and superseded by spurious and revolutionary governments. The setting up of a pretended central or general government, styled 'The Confederate States of America,' followed, and soon thereafter, open rebellion and war of portentous magnitude burst upon the nation. *The Prize Cases*.

"In the seceded states (so-called), the sovereign authority being, for the time, displaced, consequently there ceased to be, within any of them, a government under the Constitution of the United States." *Vide* 1 Bishop's Crim. Law, 3d ed., § 129; and *Mauran v. Insurance Co.*, 6 Wall. 1.

In 1863 and 1864, the complainant was in the discharge of his duties as a surgeon in the national army; and whether he had knowledge of the pendency of the alleged proceedings for partition, is a matter quite immaterial. He, however, in his bill avers that he knew nothing of them; but admits that he has some indefinite information that the property was sold and was purchased by John C. Ferrill, and was paid for in Confederate notes. But, suppose notice—actual or constructive—came to him; still, he could not be charged with laches, for, had he responded, it would have been *ipso facto* a breach of his allegiance to the United States: *Hanger v. Abbott*, 6 Wall. 532. And in that case Mr. Justice CLIFFORD, in giving the opinion of the court, said: "War, when duly declared or recognised as such by the war-making power, imports a prohibition to the subjects or citizens, of all

commercial intercourse and correspondence with citizens or persons domiciled in the enemy country."

In a subsequent part of the same opinion, that eminent judge,—while remarking on the temporary cessation of common-law and statutory limitations during war,—used the following language: "But the exception set up in this case stands upon much more solid reasons, as the right to sue was suspended by the acts of the government, for which all the citizens are responsible. Unless the rule be so, then the citizens of a state may pay their debts by entering into an insurrection or rebellion against the Government of the Union, if they are able to close the courts, and to successfully resist the laws, until the bar of the Statute of Limitations becomes complete, which cannot for a moment be admitted."

The last quotation forcibly illustrates the maxim, that no one ought to be allowed to take advantage of his own wrong; a maxim applicable to the case now before this court; not so much, however, in a positive, as in a circumstantial sense; yet falling within the principle, that no one shall entitle himself to enforce a defence by reason of acts adopted or acquiesced in by him, after full knowledge of their nature and legal ulterior consequences.

If Mr. Ferrill were a *bonâ fide* purchaser, who purchased and paid his money for the property, confiding in the judgment of a tribunal of competent jurisdiction, then this court would decline to take cognisance of this suit,—notwithstanding irregularities in the original proceedings,—if the tribunal which assumed to entertain them had jurisdiction of the subject-matter and of the rights of the complainant in this bill.

Indeed, the most that can be said against complainant's title is that it is not free from doubt, but all the doubt there is concerning it is raised by the sale under a pretended judgment of partition, and the validity of that sale depends upon the validity of the judgment.

It is a principle governing all courts of judicature that a judgment of a tribunal which has no jurisdiction of the parties and subject-matter, is absolutely void, and must be so treated when the record is offered in evidence or used for any other purpose: *Buchanan v. Rucher*, 9 East 192; *Borden v. Fitch*, 15 Johns. 121; *Newdigate v. Davy*, 1 Ld. Raym. 742. In that case, Sir

Richard Newdigate gave a donative to Davy, and afterwards removed him and put in S. Davy, in the time of James II., cited Newdigate before the high commissioners, who restored Davy and made Newdigate pay to him all the arrears he had received. After the Revolution of 1688, Newdigate brought *indebitatus assumpsit* against Davy for money as paid to his use. The court gave judgment for the plaintiff, because it was money paid in pursuance of a void authority.

My conclusion is, that the proceedings for partition, by the pretended Superior Court of Chatham county, in 1863 and 1864, so far as the rights of the complainant are concerned, were utterly void.

The main question being adjudged adversely to John C. Ferrill, still it seems to be necessary to notice another matter which was pressed with great earnestness. It was said on the part of Ferrill that adverse possession is a bar to a proceeding for partition both in equity and at law. "If," said the counsel, "the bill states an adverse possession, it should be dismissed without prejudice." Citing 2 Barb. Ch. 398; 3 Id. 608; 4 Id. 493; 5 Id. 51; 9 Id. 516; Hoff. 560; 1 Johns. Ch. 111; 9 Cow. 516, 573, and Richd. Eq. 84. These authorities uphold the doctrine contended for.

In addition to those authorities counsel also relied on the case of *The Bishop of Ely v. Kenrick*, Bunb. R. 322. There the bill for partition was dismissed, because the title was *denied*. Without questioning the law of that decision, it must be deemed somewhat novel; for by it, every defendant in a suit for partition who chooses to deny title, holds the complainant at his mercy.

Courts, as eminent for their decisions as those referred to in argument, have of late progressed beyond this ancient technical rule of chancery practice. In *Howy et al. v. Goings*, 13 Ill. R. 95, Mr. Justice TRUMBULL, in delivering the opinion of the Supreme Court of the state of Illinois, said: "There can be no doubt, however, that a bill in chancery lies for partition, notwithstanding an adverse possession, unless it has been continued sufficiently long to bar a recovery under the Statute of Limitations, which is not pretended in this case." Citing *Overton v. Woodfolk*, 6 Dana 374.

I carefully looked into the bill in the present case, and have

found no allegation of adverse possession, nor is it set up in the answer, or proved by the evidence.

It is said that in a bill for partition, the averment of possession is not sufficient, there must be an averment of title: 2 Atk. 882; Amb. 236. And the reason of this rule is plain, for it is upon the title that courts of equity act; and to render the title of each complete, they compel the parties, when the several portions are allotted, to execute conveyances according to the partition, and the execution of these conveyances draws to them the possession.

If there is no relaxation of the rule which obtained in the English Chancery and in the Chancery Courts of several of the older states of the Union, then, where a bill is filed for partition, and an adverse possession is interposed, or where the legal title is disputed, or suspicious circumstances darken it, it is usual for the court to make a decretal order arresting the proceedings, until the parties disputant settle the title in a court of law: 1 V. & B. 552; 3 Johns. Ch. 303; 4 Id. 276. But in some of the states, owing in part at least to the peculiar manner in which the tribunals of justice are there constituted, by the blending of the offices of chancellor and common-law judge in the same person, the rigid chancery doctrine has been greatly modified.

In Georgia, for example, these offices—distinguishable, in some degree, in a judicial sense—are exercised by the same person. And such, indeed, is likewise the case in this court. See Act of September 24th 1789, § 11, 1 Stats. 78.

The Supreme Court of the United States, in *Parker v. Kane*, 22 How. 1, speaking of chancery practice in suits for partition, said: "In Great Britain a chancellor might have considered this a case in which to take the opinion of a court of law, or to stay proceedings in the partition and cross-suits until an action at law had been tried to determine the legal title: *Rochester v. Lee*, 1 McN. & G. 467; *Clapp v. Bronaghan*, 9 Cow. 530. But such a proceeding could not be expected in a state where the powers of courts of law and equity are exercised by the same persons." But, in my opinion, this case has not thus far presented any question of fact upon which an issue could be framed for the determination of a jury; the evidence in the cause is unassailed, uncontradicted, and in no way conflicting. John C. Ferrill, the contesting defendant, stands upon the record of the proceedings

of 1863 and 1864, and if it be tried it must be done by inspection, and this is the province of the court.

Partition and account decreed accordingly.

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*Supreme Court of Pennsylvania.*

PITTSBURGH, FORT WAYNE, AND CHICAGO RAILROAD CO. v.  
SHAEFFER ET AL.

Mere forbearance by a creditor to the principal debtor, however prejudicial it may be to the surety, will not have the effect of discharging him from his liability.

The case of the sureties of a railroad officer, charged with the receipt and disbursement of money, is within the rule; and the company is not bound to dismiss the officer as soon as any default becomes known, and to give notice to the sureties that they may take measures to secure themselves by proceedings against the principal.

Where an officer of a corporation violates his duty, knowledge on the part of other officers of the corporation of the default, or even connivance in it, does not discharge the sureties.

ERROR to the District Court of Allegheny county.

*W. H. & Jas. Lowrie*, for plaintiffs in error.

*Acheson & Koethen*, for defendants.

The opinion of the court was delivered by

SHARSWOOD, J.—The rule is well settled that mere forbearance by the creditor to the principal debtor, however prejudicial it may be to the surety, will not have the effect of discharging him from his liability: *United States v. Simpson*, 3 Penna. Rep. 437. That this is the general principle was admitted by the learned judge in the court below, but he thought that the sureties of a railroad officer, charged with the receipt and disbursement of various sums of money, formed an exception, and that in such a case it was the duty of the company to dismiss the officer as soon as any default became known, and to give notice to his sureties in order that they might take measures to secure themselves by proceedings against the principal.

But no authorities are to be found in the books sustaining any

such distinction. On the contrary, in regard to the sureties of the officers of government, whose duties in receiving and disbursing money are of the same varied character, it has been invariably held that they are not discharged by such indulgence. *The United States v. Kirkpatrick*, 9 Wheat. 720, was the case of a collector of direct taxes and internal duties. "It is admitted," said Mr. Justice STORY, "that mere laches, unaccompanied with fraud, forms no discharge of a contract of this nature between private individuals. Such is the clear result of the authorities. Why, then, should a more rigid principle be applied to the government—a principle which is at war with the general indulgence allowed to its rights, which are ordinarily protected from the bars arising from length of time and negligence? It is said that the laws require that settlement should be made at short and stated periods; and that the sureties have a right to look to this as their security. But these provisions of the law are created by the government for its own security and protection, and to regulate the conduct of its own officers. They are merely directory to such officers, and constitute no part of the contract with the surety. The surety may place confidence in the agents of the government, and rely on their fidelity in office; but he has the same means of judgment as the government itself, and the latter does not undertake to guaranty such fidelity."

This principle was reconsidered and reaffirmed in *The United States v. Vanzandt*, 11 Wheat. 184, where it was held that the omission of the proper officer to recall a delinquent paymaster contrary to the express injunction of an Act of Congress, did not discharge the surety: *The Commonwealth v. Brice*, 10 Harris 211.

The reasons so clearly stated by Judge STORY in regard to officers of government, apply with equal force to the officers of corporations. Corporations can only act by officers and agents. They do not guaranty to the sureties of one officer the fidelity of the others. The rules and regulations which they may establish in regard to periodical returns and payments are for their own security, and not for the benefit of the sureties. The sureties, by executing the bond, became responsible for the fidelity of their principal. It is no collateral engagement into which they enter, dependent on some contingency or condition different from the engagement of their principal. They become joint obligors with



him in the same bond and with the same condition underwritten. The fact that there were other unfaithful officers and agents of the corporation, who knew and connived at his infidelity, ought not in reason, and does not in law or equity, relieve them from the responsibility for him. They undertake that he shall be honest, though all around him are rogues. Were the rule different, by a conspiracy between the officers of a bank or other moneyed institution, all their sureties might be discharged. It is impossible that a doctrine leading to such consequences should be sound. In a suit by a bank against a surety on the cashier's bond, a plea that the cashier's defalcation was known to and connived at by the officers of the bank, was held to be no defence: *Taylor v. Bank of Kentucky*, 2 J. J. Marsh. 564.

But it is urged that in this case the rules and regulations of the railway company were expressly made a part of the contract with the sureties. The condition of the bond in suit was that the said Charles A. Shaeffer "shall, with care and diligence, faithfully discharge the duties devolving upon him as cashier, as required by the present rules and regulations of said Pittsburgh, Fort Wayne and Chicago Railway Company (a copy of which he acknowledged to have received) hereby adopted, and by such other rules and regulations as said company may hereafter adopt, and shall promptly obey all orders that may be issued by said company, or by their duly appointed officers or agents." Even giving to the words "hereby adopted," which are plainly, however, a mere clerical error for "heretofore adopted," all the force attributed to them, it is not easy to see how it helps the sureties. One of these rules, and the one principally relied on by the defendants, was that "they (the cashiers) shall make a monthly return to the auditor on or before the 10th of each month, in manner and form prescribed." Shaeffer failed to make such returns as is alleged. His failure was a breach of the condition of the bond. It is not provided in the rules that on his default in making returns he shall be immediately dismissed and the sureties notified of his default. Admitting that such a rule would have been part of the contract, the absence of it leaves the case bare of any legal or equitable ground of defence. It was clearly not the duty of the company to give notice to the sureties of the principal's failure to make returns: *Orme v. Young*, 1 Holt N. P. 84.

There was nothing in this case but simple indulgence and forbearance, and that under circumstances which were not such as to call for any extraordinary diligence. Whatever may have been the discrepancies between Shaeffer's cash-book and his returns, the account which is annexed to the plaintiffs' paper-book shows that the balances due by him according to the ledger, varied from month to month—from May to October 1864—when he was notified of his discharge. In June it was \$5270.59; but in August only \$2110.83, and in September \$3101.83. The balance found in his hands at the close of his last month (October) was \$13,891.27; showing, by subtracting from it the September balance, that his default in that month alone was \$10,789.44. This may have been the result of previous defaults brought into that month's account; but supposing the directors to have had access to these returns and accounts, and that it was their duty to scrutinize them, what was there to fasten on them the charge of negligence, even so far as the company—whose interests, and not those of Shaeffer's sureties, they were bound to consult—was concerned? I confess myself unable to discover it.

Judgment reversed, and *venire facias de novo* awarded.

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*United States District Court, Western District of Pennsylvania.*

IN THE MATTER OF MICHAEL O'HARA, BANKRUPT.

Compensation of counsel for petitioning creditors in involuntary bankruptcy, is taxable as part of the costs of the proceedings, and payable out of the fund realized.

But the principle does not extend to give petitioning creditors a right to contribution from the other creditors in case of failure to realize a sufficient fund to pay expenses and counsel fees.

COUNSEL for the petitioning creditors presented to the Register a claim of \$1500 for compensation for their services as counsel, which they asked to have taxed in their favor as costs in the proceedings, to be paid out of the funds in the hands of the assignees.

At the time of presenting said claim, they also made proof that notice of their intention to do so had been served upon the bankrupt and the assignees. The bankrupt neither appeared in person,

nor was he represented by counsel. The assignees appeared and filed a written objection to the allowance of said claim, on the ground that no provision therefor is made either in the Bankrupt Act or General Orders; admitting, however, the extent of the services rendered, and the reasonableness of the charge therefor.

Opinion by

SAMUEL HARPER, Register.—A question similar to this one has been decided in favor of allowing compensation to the petitioning creditors' counsel by Judge BRYAN, of the United States District Court for South Carolina: *In re Daniel Williams*, 2 Bankrupt Register 28. It is true that the decision in that matter rested on an analogy drawn from the practice in the courts of that state, in Chancery, in allowing counsel fees on a creditor's bill against the insolvent estates of deceased persons, yet the learned judge gives other equitable and just reasons for the allowance.

"There is," said he, "a very cogent reason why any single creditor should feel at liberty to prosecute without the fear of having his claim swallowed up by the expenses of the suit—even when successful. The act contemplates fraud as the ground of prosecution in a great variety of forms. Instant action by one creditor in a precise locality, separated from all other creditors, and without opportunity of counselling with them, is necessary for the efficient administration of the law, and the protection of the whole body of creditors. To wait for time for consultation would, in numerous instances, be to lose the golden moment, and let the fraudulent debtor go free."

In that case it was remarked that, "in contemplation of law, so far as his property is concerned, the bankrupt is dead. He is no longer entitled to control over it, or the distribution of it. It is assets in the possession of the court, to be administered by the agency of an assignee, for the equal benefit of all creditors—not preferred and protected by liens—and such lien-creditors secured in their liens, as in the case of an insolvent deceased's estate." In the present case, this condition of things exists as the result of the proceedings instituted, and (after an unusually severe struggle) successfully prosecuted by the petitioning creditors; and although the Bankrupt Act and General Orders are silent upon the subject, I think it is within the equity of the court to say whether the general creditors shall reap the benefit and share

in the burdens, or whether they shall be entirely exempt from the latter, and the expense of preparing the petition and its prosecution to the decree of bankruptcy be thrown upon the petitioning creditors alone. To say the latter, is to say that the involuntary feature of the Bankrupt Law is a delusion and a fraud. A decision that casts such a pecuniary burden upon the creditor who rescues the property of a fraudulent debtor for the benefit of all his creditors, will virtually amount to the abrogation of the involuntary provisions, for it will deter individual creditors from instituting proceedings against their debtors, which are almost sure to involve them in still greater pecuniary loss.

The debt of the petitioning creditors in this matter, as proved before the Register, amounts to \$1511.80. If the burden of this claim should be thrown on them, and the bankrupt's estate should pay all debts in full, it follows that the petitioning creditors would realize out of the estate *eleven dollars and eighty cents*, or considerably less than one per cent., while the other creditors would realize one hundred per cent.

It is no answer to this position to say that the creditors of a debtor can consult together before proceedings are instituted, and agree to equally bear the necessary expenses. I have no knowledge of any bankruptcy matter all the creditors in which could be got together in time to prevent the accomplishment of the debtor's purpose. It is difficult to follow the most kinds of property after the possession has passed to others; and the hope of recovering the value of such property from those who may have aided the debtor in his fraudulent transactions, affords but little encouragement for the institution of legal proceedings necessarily expensive. The suggestion that the creditors may or should consult before filing the petition, and agree to bear the expense jointly, is, however, a recognition of the equity of this claim. To allow this claim is merely to say—after the successful prosecution of the petition—what the creditors themselves would almost universally say before the filing of the petition. And there is more reason and justice in saying it now, because by the prompt action of the creditor who first learns of the fraudulent actions of the debtor, much more of his property is rescued for the benefit of the creditors than would be the case if the proceedings were delayed until the creditors could be got together for consultation. The summary processes of the Bankrupt Law encourage prompt action. Its

involuntary provisions were intended to be efficient in the punishment of dishonest debtors, and the distribution of their property among their creditors. That efficiency would be entirely neutralized if the petitioning creditors, instead of acquiring advantages by their proceedings, are to incur heavy pecuniary burdens.

The analogy in the South Carolina case I have cited, does not, however, exist in Pennsylvania, but I do not think it necessary that it should. I base my opinion on the equitable rule that he who shares in a benefit should contribute a like share to the expenses incurred in realizing the benefit. The Bankrupt Law is intended to be an uniform system. If it be just and equitable in South Carolina to tax the compensation of the counsel for the petitioning creditor as part of the costs, as I believe it is, it is just and equitable to do the like in Pennsylvania.

The case *Ex parte Plitt*, 2 Wall. Jr. 453, is somewhat in point. One Mathias Aspden died in London, 1824, leaving an immense personal estate to his "heir at law" or "lawful heir." Litigation followed to determine who was entitled to the estate, and occupied the attention of the Federal Courts from 1826 to 1852. Several of the most eminent counsel in the country were concerned in it; and the question presented in *Ex parte Plitt* in relation to counsel fees was raised by counsel, who, owing to the complex character of the litigation, were instrumental in securing the fund for the successful claimants, though in the end they represented conflicting interests.

Judge KANE, in the absence of Judge GRIER, delivered the opinion of the Circuit Court. I quote as follows:

"Over and above the fees of office, this fund is subject to three classes of charge:—

"1st. The necessary expenses of ascertaining it, and reducing it into possession.

"2d. A reasonable compensation for its safe keeping, and the supervision of its interests.

"3d. The expenses of ascertaining the proper distributees, and making distribution among them."

In the first class he included the expenses paid by an unsuccessful claimant for a commission to England, and \$1000 as compensation for services in securing a large amount of money to the estate.

In the third class he included the claims for counsel fees, and

said: "We have no doubt of the power of the court, where a fund is within its control, as in the case before us, to take care of the rights of the solicitors who have claims against it, whether for their costs, technically speaking, or their reasonable counsel fees."

Again: "Now, it is the familiar rule of courts of equity, where a suit has been instituted and carried on for the benefit of many, that all who come in to avail themselves of the decree shall bear their just proportion of the charges."

The parallel is sufficiently clear to need no application to the present matter.

Of course this decision would not give to the petitioning creditors the right to enforce contribution from the other creditors in case of failure. It is only when success follows his petition, and there are assets to be distributed, that they can be called on to share the expense. The petitioning creditor takes these chances; and should he fail to obtain a decree of bankruptcy, or after decree fail to discover assets, he must bear the burden alone.

The only general principle ruled is, that the compensation of the counsel for the petitioning creditor is taxable as costs in cases of involuntary bankruptcy. No general rule can be laid down as to the amount of compensation. That is a subject within the discretion of the court, and cannot be determined by an agreement between the parties. The practice observed in this case is approved, and will be a precedent to govern in all like matters.

#### Opinion of the court by

MCCANDLESS, J.—As the solution of this question does not depend upon any statutory provision, and, as a precedent, is of consequence to the profession and the public, before concurring with the Register, I have given to the subject mature consideration. I have arrived at the conclusion that his opinion is based on sound principles, and sustained by sufficient authority. The fund is within the control of the court, and it is our province so to administer it as to do exact justice to all the creditors. We have judicial knowledge of the professional services rendered by the able counsel of the petitioning creditors, by whose exertions the fund has been realized; and, as we consider the fee charged reasonable, it is proper that their compensation, as one of the incidental expenses, should be deducted before distribution.

The decision of the Register is affirmed.

## ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF CALIFORNIA.<sup>1</sup>COURT OF CHANCERY OF NEW JERSEY.<sup>2</sup>

## CONSTITUTIONAL LAW.

*Regulation of Commerce.*—The term "commerce," as employed in section 8, Art. I. of the Constitution of the United States, is not limited to an exchange of commodities only, but includes, as well, "intercourse" with foreign nations, and between the states; and the term "intercourse" includes the transportation of passengers: *People v. Raymond*, 34 Cal.

When the Congress, in the exercise of its constitutional right, has by its legislation established regulations of commerce with foreign nations, and among the several states, its authority is paramount and exclusive, and its enactments supersede all state legislation on those subjects. Whether the states could constitutionally exercise this power in the absence of congressional legislation, not decided: *Id.*

In the case where the state has not the constitutional power, by means of direct legislation, to regulate the intercourse of its citizens with foreign nations, and with the other states, it cannot accomplish by indirect methods what it is forbidden to do directly: *Id.*

By the enactment of section 285 of the United States Internal Revenue Act, 2 Bright. Dig. 271, the Act of August 30th 1852, and the Act of March 6th 1855, 10 U. S. Stat. at Large 61, 715, Congress has undertaken to regulate the entire business of transporting passengers by sea: *Id.*

The act entitled "An act to provide revenue for the support of the government of this state from a tax upon foreign and inland bills, passengers, insurance companies, and other matters," passed May 14th 1862, has no reference to the execution of the inspection laws of this state, and is not in the nature of a police regulation, but is a measure designed for revenue purposes only: *Id.*

The stamps which, by the provisions of the act, are required to be purchased from the state, are to be regarded in no other light than as a tax on the contract for passage, to be paid by the passenger. This is a regulation of commerce within the meaning of section 8, Art. I. of the Federal Constitution, and the act is unconstitutional and void: *Id.*

*Certificate of Election to ex officio Office.*—It is not essential to the right of entry on the discharge of the duties of an *ex officio* office, that the incumbent should receive a separate certificate of election thereto, or take therefor a separate oath of office, when not specially so required by the act creating or regulating such office: *People v. Kelsey*, 34 Cal.

*Power of Legislature.*—The legislature has the constitutional power

<sup>1</sup> From J. E. Hale, Esq., Reporter; to appear in 34 Cal. Rep.

<sup>2</sup> From C. E. Green, Esq., Reporter; to appear in vol. 4 of his Reports.

by enactment to divest an officer of an *ex officio* office to which he had been elected and duly qualified, by a repeal of the law under which he became invested therewith, provided, where such office be created under the Constitution, such repeal does not in effect abolish such office: *Id.*

In such case, however, this power does not extend to the transfer of an *ex officio* office which, under the Constitution, is required to be filled by election, to the incumbent of another office who has not been elected to such *ex officio* office: *Id.*

The clause, to wit: "Assessors and collectors of town, county, and state taxes shall be elected by the qualified electors of the district, county, or town in which the property taxed for state, county, or town purposes is situated," contained in section 13 of Art. XI. of the Constitution, is imperative and mandatory, and restricts the power of the legislature to a particular mode of providing such assessors and collectors in the first instance, subject to such mode of filling vacancies which may be occasioned by the death, resignation, or other legal disability of the incumbent as the Constitution has, and statute law may, provide: *Id.*

The legislature may by law devolve the office and duties of tax collector upon the incumbent of any other elective office, but such law must precede the election of such officer, and his election must be by the qualified electors of the tax collector's district: *Id.*

The act entitled "An act making the county treasurer of San Joaquin county *ex officio* tax collector," passed April 2d 1866, was not designed to fill a vacancy in the office of tax collector, but it was to make the treasurer, instead of the sheriff, of San Joaquin county tax collector. In so far as the act provides for the transfer of said office to take place before an election of such treasurer occurs, it is unconstitutional and void: *Id.*

#### CONTRACT. See *Railroad.*

*Specific Performance—Laches.*—A delay of fifteen years in calling for the specific performance of a parol contract for the conveyance of land, without any attempt to enforce it in the lifetime of the contractor, is a circumstance of great weight against the party seeking performance, and will render necessary more strict and fuller proof, and a closer scrutiny of the evidence: *Eyre v. Eyre and Others*, 4 C. E. Green.

Part performance will take a contract out of the Statute of Frauds, when it has been in part performed in such manner that a refusal would be a fraud on the other party. But for this purpose the contract itself must be clearly proved, and the acts of part performance must be referable to the contract alone: *Id.*

#### DEBTOR AND CREDITOR.

*Fraudulent Conveyance.*—A conveyance made in consideration of the grantee's assuming the mortgages upon the property, amounting to one-fourth of its value, declared voluntary and void as against the creditors of the grantor, as to three-fourths of the value; but being positively intended also to delay and defraud creditors, it was declared void *in toto*, and the purchaser (at a sheriff's sale of the property) entitled to hold the same free from all claim of the grantee except for the amount due on such mortgages held or paid by him and the interest thereon, the



rents and profits to be set off against so much of those debts as are due to the grantee: *Mead v. Combs*, 4 C. E. Green.

*Mortgage fraudulent as to Creditor.*—A judgment-creditor purchasing at sheriff's sale, under his judgment, is entitled to have a mortgage upon the property, given by the defendant in execution in embarrassed circumstances, set aside and declared void as against such purchaser on the ground that it was given to delay and defraud creditors, and without consideration: *King v. Storey and Others*, 4 C. E. Green.

*Bill to set aside Conveyance in fraud of Creditor.*—A creditor cannot file a bill to set aside a transfer of property fraudulently made by his debtor, until he has a judgment or execution, such as would give a lien on that property if not transferred: *Green v. Tantum*, 4 C. E. Green.

At common law, a judgment or execution gave no lien upon the choses in action of the debtor or debts to him. But by the Act of March 7th 1850, to prevent fraudulent trusts and assignments, and the supplements to the Chancery Act, a creditor upon the return of an execution *nulla bona*, has a lien upon the choses in action of his debtor, and can maintain a suit to set aside a fraudulent assignment: *Id.*

Although a purchaser of property transferred by a debtor to defraud his creditors, pay full consideration and have no notice that the property is transferred to him for that purpose, yet if the circumstances are such from which he must have inferred that such was the object, the sale will be set aside as against a creditor: *Id.*

#### DEED.

*Variation by parol agreements.*—Where a deed expresses a consideration, though merely nominal and never paid, no use results to the grantor, and parol proof that the conveyance was intended to be in trust for the grantor will not raise a trust: *Hogan v. Jaques and Others*, 4 C. E. Green.

A trust estate cannot be sold by execution: *Id.*

That a deed absolute on its face was really given as security for a debt and intended only as a mortgage, may be shown by parol proof, but the proof must be very plain where the debt does not remain, or is considered as paid by giving the deed: *Id.*

A verbal promise by the grantee to the grantor that he would reconvey the land upon receiving back the amount of his debt will not be enforced; much less against a purchaser for valuable consideration, without notice: *Id.*

#### EJECTMENT.

*Writ of Restitution.*—A party and her tenants, coming into possession of lands, after an action brought to recover possession, under a prior unrecorded deed from two of the defendants in the action, of which plaintiff had no notice when the action was commenced, were properly dispossessed under a writ of restitution, issued on a judgment for plaintiff in said action: *Mayne v. Jones*, 34 Cal.

A motion made to set aside the return to the writ, showing the dispossession of said party and her tenants, and to reinstate them in possession, upon a showing of said facts, under the peculiar circumstances of the case disclosed by the record, was properly denied by the court

below. (*Leese v. Clark*, 29 Cal. 672, cited as authority, and error in report of that case corrected): *Id.*

Where a defendant, duly served in an action brought to recover possession of lands, was in possession of a portion of the demanded premises as guardian of an infant who held an unrecorded conveyance thereof, of which plaintiff had no notice when the action was commenced: *held*, that such defendant, and the infant and her tenants, who entered subsequent to the commencement of the action, were properly disposed under a writ of restitution issued on a judgment for plaintiff in said action: *Id.*

### EQUITY.

*Practice.*—A complainant cannot dismiss his own bill as to part of the relief prayed, and proceed with the residue; he must apply to amend: *The Camden and Amboy Railroad Co. v. Stewart*, 4 C. E. Green.

*Party's own Fraud.*—A court of equity will not relieve against a conveyance made to prevent the grantor's property from being sacrificed and his creditors from recovering their money. And no subsequent promise for the reconveyance of such property, founded on such fraudulent consideration, will be enforced: *Eyre v. Eyre and Others*, 4 C. E. Green.

*Parties to Bill.*—Where the answer of one of several defendants objects to a bill for want of proper parties, and the controversy as to that defendant is settled before the final hearing, the objection will be disregarded: *Booraem v. Wells*, 4 C. E. Green.

In a suit to set aside a conveyance to a trustee to hold in trust for one person for her life, and at her death to such of her children as she may appoint, such children as the *cestui que trust* may have are not necessary parties; their interest is too uncertain and contingent: *Id.*

EXECUTOR. See *Will*.

FRAUDS, STATUTE OF. See *Contract*.

### HIGHWAY.

*Surveyor's Return—Encroachments on.*—A return of surveyors of the highways coming up collaterally in this court, cannot be judged void or disregarded for any irregularity or deficiency, if the surveyors had jurisdiction of the subject-matter: *Tainter v. Morristown*, 4 C. E. Green.

It is not necessary that a commission be appointed to ascertain the lines of an ancient highway before proceeding to remove encroachments alleged to be thereon, when the true limits and courses thereof can be ascertained with accuracy and certainty, and in fact are so ascertained by survey: *Id.*

Time will not legalize an encroachment upon a public highway: *Id.*

The Act of March 24th 1859 (Nix. Dig. 751), applies not to ancient highways, but to roads not opened, used or worked within twenty years after being laid out: *Id.*

### HUSBAND AND WIFE.

*Action by.*—Where, pending a suit by a husband and wife for the

specific performance of an agreement to convey real estate to the wife, the wife dies, and her children have not been made complainants, and there is no order that the suit should proceed in the name of the surviving complainant, no decree can be made: *Hand v. Jacobus and Wife*, 4 C. E. Green.

*Divorce—Evidence.*—Divorce, on the ground of adultery, will not be decreed upon the testimony of a *particeps criminis*, herself notoriously unchaste, and in her evidence untruthful and reckless, uncorroborated by any circumstances that lead to the conviction of the defendant's guilt: *Clare v. Clare*, 4 C. E. Green.

The proof of adultery, to justify a decree of divorce, must not only be clear and direct, but it must be entitled to and command belief: *Id.*

INFANT. See *Tenant for Life*.

#### INJUNCTION.

*Dissolution of.*—An injunction will be dissolved upon the answer only when it denies explicitly the facts upon which the equity of the bill is founded; it is not sufficient that it denies the inference to be drawn from those facts or their effect: *Teasey v. Baker*, 4 C. E. Green.

#### JUDGMENT.

*Collaterally attacked for want of Jurisdiction.*—The judgment of a court of superior jurisdiction may be collaterally attacked upon the ground that the court by which it was rendered had no jurisdiction, either of the subject-matter or of the person of the defendant, or both: *Hahn v. Kelly and Morse*, 34 Cal.

Such facts or circumstances only can be shown or relied on, in support of such attack, as affirmatively appear on the face of the record, or what, under the law as it read at the date of the judgment, constituted the judgment-roll: *Id.*

*Verity of Record or Judgment-Roll.*—The judgment-roll, as prescribed by the Civil Practice Act, constitutes the record of a court of superior jurisdiction, and, because it imports absolute verity, it cannot be collaterally attacked by proof *aliunde*: *Id.*

It is not essential that the jurisdiction of a superior court should affirmatively appear in the judgment-roll; if it does not, and the contrary does not therein affirmatively appear, jurisdiction will be conclusively presumed: *Id.*

*Inspection of the Record.*—The rule by which inspection of the record is governed is, that legal presumptions do not come to the aid of the record, except as to acts or facts touching which the record is silent. In such case, it will be presumed that what ought to have been done was not only done, but rightly done; but where the record states what was done, it will not be presumed that something different was done. A want of jurisdiction affirmatively appears on the face of the record, when whatever was done is stated, and which, having been done, was not sufficient in law to give the court jurisdiction: *Id.*

Another rule is, that the whole record must be permitted to speak, as where that portion which is denominated the proof of service, is not

silent, but recites facts and acts done, as constituting the service made, and which, if the record were otherwise silent, would make it affirmatively show a want of jurisdiction of the person of defendant, yet if, in another part, as the judgment, further facts or acts, not irreconcilable with the former, be recited, which establish such jurisdiction, it is sufficient to uphold the judgment: *Id.*

Where the judgment recites the fact that the defendant has been duly served with process, it is a direct adjudication by the court upon the point, and is as conclusive on the parties as any other fact decided in the cause, provided it does not affirmatively appear from other portions of the record, consisting of the judgment-roll, that the recital is untrue: *Id.*

*Legal Presumptions as to Jurisdiction of Courts.*—The rule is, that the presumptions of law are in favor of the jurisdiction and of the regularity of the proceedings of courts of superior or general jurisdiction, which, in this state, comprise all courts of record, and this rule obtains equally, whether their proceedings be by the course of the common law or statute law, or be in the acquisition of jurisdiction of the person of defendant, by making either actual or constructive service of the summons on him; but that no such presumptions are indulged in favor of the jurisdiction or regularity of the proceedings of courts and tribunals of inferior or limited jurisdiction, which, in this state, comprise all courts not of record, and all special boards and tribunals which are created by law and clothed with judicial functions of a limited and special character; and all persons who claim any right or benefit under their judgments must show their jurisdiction affirmatively: *Id.*

LEGACY. See *Will.*

LIMITATIONS, STATUTE OF. See *Highway.*

*Right of Redemption, when Barred.*—The right of the mortgagee to maintain an action on the debt, and to enforce the lien of the mortgage given to secure it, and the right of the mortgagor to maintain an action for the redemption of the property from the lien of the mortgage, are reciprocal; and when one is barred by the Statute of Limitations the other is also barred: *Arrington v. Liscom et al.*, 34 Cal.

*Title Under.*—An adverse possession of land for the period of time prescribed by the Statute of Limitations, not only bars the remedy, but practically extinguishes the right of the party having the true paper title, and vests a perfect title in the adverse holder: *Id.*

*As a Source of Title to Lands.*—A party who has been in the exclusive adverse possession of lands for a period of time which, under the Statute of Limitations, vests him with a title thereto, may maintain an action against a party claiming under a record title, to have said adverse claim determined and adjudged null and void as against him: *Id.*

"Title to land is the means whereby the owner of lands has the just possession of his property." A party, under the Statute of Limitations, may acquire an absolute right of possession in lands as against all the world; such a right as, when ousted, will restore him to and effectually protect him in his just possession thereof, even against one having the

written title. An adverse possession, therefore, confers a substantial title, and it is such a title as entitles the holder to all the remedies to quiet his possession that are incident to possessions under written titles: *Id.*

*Action to remove Cloud upon Title.*—An apparently good record title to land constitutes a cloud upon a title thereto which has been subsequently acquired by adverse possession under the Statute of Limitations, which the holder by adverse possession is entitled to have removed. This statute would have performed but half its mission as a statute of repose, if the party relying upon it, as to a party claiming under a written title, must wait till he is attacked before he can reduce the evidence of his title, which otherwise rests only in parol, to the form of a permanent record: *Id.*

#### MORTGAGE. See *Limitations.*

*Of Chattels.*—Under the Act, concerning chattel mortgages, of March 24th 1864, Pamph. L. 493, a mortgage upon chattels situate in a different county from that in which the mortgagor resides, and recorded only in the county where the chattels are situate at the time of the execution of the mortgage, is entitled to priority in payment over another mortgage, of a prior date, but of which the subsequent mortgagees had no notice, and recorded subsequently, though recorded in the county where the chattels lay, and also in that where the mortgagor resided at the time of its execution: *De Courcey and Others v. Little and Others*, 4 C. E. Green.

*Of Canal-Boat.*—By a statute of New York, any mortgage on canal-boats, or a copy thereof, is required to be filed in the office of the auditor of the canal department, and within thirty days next preceding a year from the filing thereof, a copy is required to be again filed, or the mortgage shall be void as against the creditors of the mortgagor or subsequent purchasers or mortgagees in good faith:

*Held*, upon a bill to foreclose such a mortgage, the second copy whereof was not filed till after the year had elapsed, that the mortgage was valid as against attachments sued out in this state, after the actual filing of such second copy, for wages accrued since such filing, but must be postponed to such wages as accrued before the re-filing, as well before as after the default: *Herrick v. King and Others*, 4 C. E. Green.

*For Collateral Security.*—If a mortgagee who holds a mortgage for \$10,000 as collateral security for a note of the mortgagor for that amount, at the request of the mortgagor assigns the mortgage to a third person for \$7500 in cash, credits this sum on the note, and retains the note, and the balance of \$2500 is paid by the mortgagor, such mortgage in the hands of the assignee is a valid security for \$7500 only as against subsequent encumbrancers at the time of the assignment. That is the only part of the debt for which it was given that remains unpaid: *Hoy v. Bramhall*, 4 C. E. Green.

A conveyance of part of mortgaged premises "subject to the payment of all liens now on the same," does not create a personal obligation on the vendor to pay the mortgage or any part of it; but it makes the part so conveyed as against the residue subject to its proper proportion of the mortgage-debt, and to that only: *Id.*

A mortgagee who holds a mortgage on two parcels, one of which is subject to a second encumbrance, will be compelled first to exhaust the security on which the second encumbrancer has no lien, or to subrogate the second encumbrancer to his claim on the parcel mortgaged only to him: *Id.*

*Former Recovery on Bond for part of the Amount.*—A suit brought in New York upon a bond by a person to whom it was assigned as collateral security for a less amount, in which only the amount for which it was assigned as collateral security was recovered, and to which the obligee was no party, does not satisfy and extinguish the bond as against the obligee. And in a suit brought by the absolute assignee of the bond and mortgage subsequent to such collateral assignment, he will be entitled to a foreclosure of the mortgage for the residue due upon it, beyond the amount recovered: *Brumagin v. Chew*, 4 C. E. Green.

The effect of such recovery will be determined by the law of the state of New York. And the well-established rule that the proceedings in any suit will not affect any one but a party to it, will be assumed to be the law of New York, until it is shown that a different rule is established there: *Id.*

*Default of Payment of Interest.*—An agreement by an assignee of a bond and mortgage that he would call at the office of the obligor for the interest, does not make that office ever after the only legal place for payment, and is not in form or legal effect an agreement so as to affect the bond: *McCotter v. De Groot*, 4 C. E. Green.

But when, in consequence of such agreement, the obligor failed to pay his interest within the thirty days limited by the condition of the bond, equity will relieve him from the forfeiture of his condition by such neglect: *Id.*

A demand by the assignee after the thirty days had elapsed, although he had not called as promised, for the payment of the principal, and a refusal to accept the interest, is notice that he did not mean to be bound by his promise. And where the obligor subsequently offered to pay that interest, and the interest about to become due, but made no tender of the latter interest within the thirty days after it became due, the complainant was held to be entitled to the principal: *Id.*

#### PARTITION. See *Tenant in Common.*

*Proceedings and Return of Commissioners.*—Exceptions will not lie to the return of commissioners in a suit for partition (on the ground of inequality of value in the lots). The correct practice in such case is by motion to suppress the return: *Hay v. Estell and Others*, 4 C. E. Green.

The court will set aside and quash the return of commissioners of partition when the partition has been made upon wrong principles, or in disregard of the rights of the parties, or where there is great and evident inequality in the division. But to set aside a partition for mere inequality, when there is no partiality or improper conduct of the commissioners, the proof must be clear, and the inequality considerable: *Id.*

The theory that commissioners in partition are, like arbitrators, judges voluntarily chosen by the parties to decide between them, and therefore they are concluded by their judgment, whether right or wrong, if not given corruptly or through favor, dissented from: *Id.*

The question to be considered by the court, on motion to quash the partition, is, whether the inequality is more than can be fairly accounted for by the difference in judgment between men of discretion in valuing the property: *Id.*

#### PUBLIC ADMINISTRATOR.

*Authority to administer on a particular Estate.*—The public administrator of the city and county of San Francisco can take upon himself the duties of an administrator of a given estate only by virtue of a special grant from the Probate Court, made upon a petition therefor filed in the matter of such estate. He does not, by virtue of his office, acquire the right to administer upon any particular estate: *In the Matter of the Estate of Hamilton*, 34 Cal.

While one administrator of an estate is in office, there is no power in the probate judge or court to appoint a new one: *Id.*

The order for the appointment, as provided in section 62 of the Probate Act, the qualification of the appointee, and the issuing of letters to him thereon, are all necessary proceedings to invest such appointee with the office of administrator of an estate. The appointment is *in fieri* until the appointee has qualified and received his letters: *Id.*

Under our statute, an administrator can only establish his official character, when denied, by the production of his letters with the oath of office annexed, or of a certified copy of the record thereof, made according to the requirements of section 72 of the Probate Act: *Id.*

#### RAILROAD.

*Contract between Connecting Roads as to Division of Fares.*—In a contract between companies owning connecting lines of railroad, for the continuous transportation of passengers and freight over both lines, it is lawful to agree upon a division of the fares, by which one company allows part of the fares earned on its line to the other company: *Sussex Railroad Co. v. Morris and Essex Railroad Co.*, 4 C. E. Green.

Such contract is valid as to future extensions of the road, even as to such as may be authorized by future legislation: *Id.*

A contract made by a railroad company which by its terms includes any future extension of the road, will include in its operation not only such as were authorized by law at the making of the contract, but such as were afterwards authorized by subsequent legislation: *Id.*

A contract between railroad companies using the same gauge, to transport passengers and freight continuously over both lines, does not imply a contract on the part of either company that it will not change the gauge of its road: *Id.*

A bill for an account of fares received according to a contract previously made between the parties, is not technically a bill for specific performance so as to induce a court of equity to refuse relief on the ground that the contract is inequitable: *Id.*

#### REVERSION. See *Tenant for Life.*

#### TENANT FOR LIFE.

*Waste—Sale of Reversion.*—A life tenant is bound to keep the premises in repair, not excepting dilapidations occasioned by ordinary

wear and tear in the proper use of the premises: *In Matter of Sale of Lands of Mary E. Steele, an Infant*, 4 C. E. Green.

The reversionary estate of an infant will not be sold because there may be a great advantage in the sale to the tenant for life, when the benefit to the infant is doubtful or inappreciable: *Id.*

#### TENANT IN COMMON.

*Partition between—Parol Promise to Convey.*—A verbal agreement by one co-tenant with another that he will convey to him his interest in the premises, is no bar to a suit for partition: *Polhemus and Wife v. Hodson and Wife*, 4 C. E. Green.

#### WASTE. See *Tenant for Life*.

*Injunction against Cutting down Shade-trees, &c.*—The unlawful cutting down of fences, shade-trees, and ornamental shrubbery, is an irreparable injury, and, where established, will be suppressed by the preventive powers of this court: *Tainter v. The Mayor of Morristown*, 4 C. E. Green.

#### WILL.

*Legacy—Chargeable on Real Estate.*—Where the real and personal estate of the testator have been blended in one common fund, and the personalty is insufficient to pay debts, and the words "not herein otherwise disposed of" are added to the residuary clause, legacies will be charged upon the real estate: *Dey v. Dey's Admr.*, 4 C. E. Green.

In determining whether a legacy is chargeable upon the real estate, the court will consider the circumstances of the testator, and the nature and amount of his property: *Id.*

A legacy to a widow, evidently intended by the testator to be paid to her, before the proceeds of his property were invested (in accordance with the directions of the will) for her use, will not be abated in case of a deficiency, in favor of legacies not payable till two years after the death of the widow: *Id.*

*Direction to sell Land—Power of Executor.*—An executor has no power to sell the lands of his testator, unless directed to do so by the will, either expressly or by implication: *Lippincott's Executor v. Lippincott*, 4 C. E. Green.

The appointment of one as executor of a will that directs lands to be sold, does not, of itself, confer on him the power to sell. But if the executor is directed by the will, or bound by law, to see to the application of the proceeds of the sale, or if the proceeds in the disposition of them are mixed up and blended with the personalty, which it is the duty of the executor to dispose of and pay over, then a power of sale is conferred on the executor by implication: *Id.*

*Power of Sale.*—If a will direct executors to sell a certain tract after the death of a certain legatee, and contains no other power of sale, a sale in the lifetime of such legatee is void: *Booracm v. Wells*, 4 C. E. Green.

A direction to rent out the house and lands devised for the use of a legatee during his life, and to make such other arrangement as the executors might deem expedient for his support on the same, does not by implication give the executors power to sell: *Id.*



An auction sale by executors, and a conveyance in execution of it on which no money is paid, but made to carry out an arrangement in itself unlawful, will be set aside; and a conveyance without consideration to third parties to carry out that illegal arrangement, will be set aside: *Id.*

If a *bonâ fide* purchaser obtains title through one who buys at a sale by a trustee or executor, so conducted as to be voidable by the *cestui que trust*, and has no notice of the facts which constitute the illegality, his title will not be set aside, although in the deed through which he claims it appears that another tract was by it illegally conveyed: *Id.*

#### WITNESS.

*Time of objecting to Competency.*—Objection to a witness incompetent by reason of interest, whose interest may be released by the party offering him, need not be made at the very time of examination; but it must be made in time for the party to remove the incompetency of the witness, if practicable, or supply by other evidence the want of his testimony: *Graham v. Berryman*, 4 C. E. Green.

#### LIST OF NEW LAW BOOKS.

CHICAGO LEGAL NEWS. Published by Myra Bradwell, Chicago, weekly at \$2 per annum.

DEAN. A History of Civilization. By AMOS DEAN, LL.D., late Professor of Law in the University of Albany. Vol. 1, Portr. 8vo. pp. xxiv., 695. Albany: J. Munsell. Cl. \$4.

DELAWARE. Rules of Practice in the Court of Chancery of the State of Delaware, as revised and established, at the Spring Sessions, 1868; with some approved forms of Chancery Proceedings. 8vo. pp. 110. Dover: James Kirk, Pr. 1868.

EDMONDS. Reports of Select Cases in the Courts of New York. By JOHN W. EDMONDS. Vol. 1. 8vo. pp. 631. N. Y.: Diossy & Co. Shp. \$6.50.

INTERNAL REVENUE RECORD. New York: P. V. Van Wyck. Weekly, \$5.

LAW TRANSCRIPT. Edited by A. B. MAGRUDER. Baltimore: P. T. Eaton & Co. Weekly, \$4 per annum.

MILLER. Pleading and Practice under the Code of Iowa. By Hon. W. E. MILLER. 8vo. pp. 796. Davenport: Luse & Griggs. \$6.

NEW YORK. Reports of Cases in the Court of Appeals of New York. With Notes, References and Index. By E. W. KEYES. Vol. 39. 8vo. pp. 724. Albany: W. C. Little. Shp. \$5.

QUARTERLY JOURNAL OF PSYCHOLOGICAL MEDICINE AND MEDICAL JURISPRUDENCE. Edited by WM. A. HAMMOND, M. D. Vol. 3. No. 1. Jan. 1869. 8vo. pp. 208. New York: D. Appleton & Co. \$5 per annum.

VIRGINIA. Reports of Cases in the Supreme Court of Appeals of Virginia. By P. R. GRATTAN. Vol. 18. 8vo. pp. xxv., 1026. Richmond: Ferguson & Rady, Prs. Shp. \$6.50.

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PROFESSIONAL MISCONDUCT.—THE CASE OF MR. BRADLEY  
AND THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

ALTERCATIONS between judges and counsel in the conduct of a cause so rarely get beyond a momentary disturbance of the regularity of proceedings, except in petty tribunals, having no proper professional character either in their judges or their bar, that they may be best allowed to pass quietly into oblivion with the close of the day. But the case of Mr. Bradley and the Supreme Court of the District of Columbia has had such prominence given it by the nature of the trial in which the dispute first arose, and the unfortunate habit of the newspapers to call the court "the Supreme Court at Washington," that it is hardly proper to pass it by without some notice in a professional journal.

The facts seem to have been as follows:—

On the 2d of July, 1867, during the trial of the case of *The United States v. John H. Surratt*, in the Criminal Court of the District of Columbia, just after the adjournment of the court for the day, a difficulty occurred between the Presiding Judge, FISHER, and Joseph H. Bradley, Sr., the prisoner's counsel. The judge's account is, that as he was descending from the bench, Mr. Bradley accosted him in a rude and insulting manner, charging the judge with having offered him a series of insults from the bench from the commencement of the trial. The judge disclaimed any intention to insult, and assured Mr. Bradley that he entertained no

feelings towards him but those of respect. Mr. Bradley, instead of accepting this explanation, or disclaimer, thereupon threatened the judge with personal chastisement.

Mr. Bradley's account differs very materially. He says that the court had not only been adjourned, but that the people had left the room, and Judge FISHER himself had gone out, but came back again for his umbrella, and, as he passed Bradley, the latter said, "Judge, what do you mean by treating me as you have done to-day?" The judge replied, in great excitement, shaking his finger insultingly in Bradley's face, and, after some altercation, the judge said, "Step out with me, step out, if you dare." Whereupon Bradley stepped towards him, but was seized by some members of the bar and held, and the judge, holding his clinched hand towards Bradley, said, "You know where to find me—I am responsible, in every form, for whatever I say or do," &c., with other abusive language.

With two such different versions before us, neither supported by the testimony of any but the interested and excited parties, it is impossible to form an opinion on the real facts as to the original aggressor, and in a question of insult, where manner and the relations of the parties are everything, it is, perhaps, impossible to do more than assume the safe general proposition that both were in the wrong.

The subsequent facts are sufficiently certain. On the conclusion of the trial, August 10th, Judge FISHER made an order reciting his version of the case as above given, and concluding with striking Mr. Bradley's name from the list of attorneys of *this court*. These words, as will be seen, subsequently became important.

Immediately on the announcement of the foregoing order, Mr. Bradley addressed the judge, saying, "Has the court adjourned yet?"

Judge FISHER.—"No, sir."

Mr. Bradley.—"Then, before it does adjourn, I desire to say, in the presence of this audience, that the statement you have read is utterly false, from beginning to end."

On the same day, August 10th, immediately after the adjournment, Mr. Bradley followed Judge FISHER into a street car, and handed him the following note:—

“WASHINGTON, August 6th 1867.

“HON. GEORGE P. FISHER :—

“Sir : In the altercation which occurred between us when you returned to the court-room after the adjournment on the 2d of July last, you observed that you were sick, and were then pleased to add ‘ You know where to find me ; and I hold myself responsible in every form for whatever I say or do,’ or words to that effect, after which you applied to me most opprobrious epithets. There is but one interpretation of such an intimation received among gentlemen. I told you I could wait ; and am gratified to find that you have recovered, and that the trial of the then pending case being now closed, we are both at liberty.

“That no time may be unnecessarily lost, I beg you will let me know, as soon as you conveniently can, when it will suit you to meet me out of this District, that we may arrange, to our mutual satisfaction, the points of difference between us without incurring the risk and odium which might accompany any controversy here, or in public.

“With the same view I hand you this note in person, and am, sir, your most obedient servant,

“JOS. H. BRADLEY.”

So far the matter had been confined to the Criminal Court, in which Judge FISHER was then presiding. The Criminal Court, however, is held in turn by the judges of the Supreme Court of the District of Columbia. The courts of the District of Columbia were organized in their present form by the Act of Congress of March 3d, 1863, which created a Supreme Court of the District of Columbia, and provided for District and Criminal Courts to be held from time to time by one of the justices of the Supreme Court of the district.

The Supreme Court of the District of Columbia, considering the Criminal Court as a mere branch of itself, on October 21st, 1867, entered a rule on Mr. Bradley, reciting the facts of the original quarrel as set forth by Judge FISHER, the order of Judge FISHER in the Criminal Court, the remarks of Mr. Bradley on the announcement of the order of August 10th, and the challenge, and calling upon him “ to show cause why he should not be punished for contempt of *this court*, by reason of said offensive conduct and language towards one of its members, and relating to the official acts of the said justice.”

Mr. Bradley filed an answer to this rule, setting forth his version of the facts as already given, and objecting that the order of Judge FISHER having been made for an alleged contempt without notice to him, Bradley, was void both at common law and under the statute of March 2d, 1831 (4 Stat. 487), and that therefore when Judge FISHER made his statement and announced the

order, the whole proceeding was extrajudicial, and the mere assertion of an individual, which he, Bradley, was authorized to contradict and deny in any manner he thought fit, and hence he could not be held guilty of a contempt in using the language he did on August 10th. He further argued that it was not technically a contempt. In regard to the letter dated August 6th, he argued that it was not a challenge, nor meant for such, but merely a letter to open the way for an amicable settlement of a private controversy, and that to remove any doubt on this subject he had withdrawn the letter before any action had been taken by the court in regard to this matter.

This answer was sworn to and filed November 4th, 1867, and Mr. Bradley having been heard in support of it, the court, on November 9th, 1867, ordered that "for the causes set forth in said rule," Mr. Bradley's name be stricken from the rolls of the court.

On March 13th, 1868, Mr. Bradley filed a petition in the Supreme Court of the United States for a mandamus to the Judges of the Supreme Court of the District of Columbia, commanding them to restore him to the rolls. The court awarded an alternative mandamus, returnable to December, 1868.

On December 5th, 1868, the Judges of the Supreme Court of the District filed a return to the mandamus. The return sets forth quite argumentatively and in detail, 1st, that Bradley was removed from his office of attorney after due notice and hearing him in his defence, and that the order was a judgment of the court on a subject within its exclusive jurisdiction, and not subject to review by any other court; 2, the contempt committed on August 10th, in open court; 3, that the Criminal Court is merely a session of the Supreme Court of the district, and therefore a contempt of the former was a contempt of the latter; 4, that the conduct of Mr. Bradley was such a misbehavior in his office of attorney, that it gave the court jurisdiction to disbar him independent of the doctrine of contempt.

The mandamus was argued on December 18th, 1868, by Hon. P. Phillips for Bradley. The court relied on its return, and was not represented by counsel.

Mr. Phillips confined his argument to the questions of jurisdiction, maintaining that the Criminal Court and the Supreme Court of the district were separate courts, and the latter had no juris-

diction to disbar for a contempt committed in the former; and that mandamus was the proper remedy.

The Supreme Court of the United States awarded a peremptory mandamus to restore Mr. Bradley, and held—

1. That the Supreme Court of the District of Columbia, as organized by the Act of Congress of 3d March, 1863, is a different court from the Criminal Court as fixed by the same act, though the latter court is held by a judge of the former. Hence, the former court has no power to disbar an attorney for a contempt of the latter.

2. An attorney cannot be disbarred for misbehavior in his office of attorney generally, upon the return of a rule issued against him for contempt of court, and without opportunity of defence to, or explanation of, the first-named charge.

3. Mandamus lies from the Supreme Court of the United States to an inferior Court of the United States, to restore an attorney at law disbarred by the latter court, when it had no jurisdiction in the matter; as *ex. gr.* for a contempt committed in another court.

On the last point MILLER, J., dissented.

The law, as laid down by a decision of the Supreme Court of the United States, made after argument, and almost with unanimity, it would not become us to criticize, were we so inclined, but we may say, with all respect, that this decision rests upon very strict technical constructions, and that the court were almost exceptionally astute in discovering grounds for their jurisdiction.

By the Act of Congress of March 2d, 1831 (4 Stat. 487, Brightly's Dig., tit. *Contempt*), the power of courts of the United States to punish summarily for contempts, shall not extend "to any cases except the misbehavior of any person or persons in the presence of said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of the officers of said courts in their official transactions, and the disobedience or resistance by any officer of said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts."

The second section provides for the punishment by indictment, of certain other acts which were contempts at common law. This act, as is noted by Mr. Phillips in his argument, was introduced by Mr. Buchanan, one of the managers of the impeachment of

Judge PECK, before the Senate of the United States, immediately after the termination of that trial. It unquestionably limits the power of the Supreme Court of the District of Columbia to punish for contempts to those cases included in the act. Were it not for this, the delivery of the letter of August 6th to Judge FISHER by Mr. Bradley, would certainly have been a contempt of the Supreme Court, for while sitting in the car in the street, Judge FISHER was as much a judge of the one court as of the other, and there can be no question that a challenge to a judge at any time, or in any place, is a gross contempt of the court of which he is a member. With the first point of the opinion of the Supreme Court of the United States, therefore, we are not entitled to find fault, though with so grave a consequence of this statute before them, it might have been worth while to inquire very rigidly if the conduct of Mr. Bradley were not within the meaning of the act.

The Supreme Court of the District, therefore, having no jurisdiction of Mr. Bradley's case on the ground of contempt, fell back on their general authority over the behavior of their attorneys (ground 4, return to the mandamus, ante, p. 132), a substantial ground upon which they might have rested securely but for a technical difficulty. The rule on Mr. Bradley had been a rule to show cause "why he should not be punished for *contempt* of this court, by reason of said offensive conduct and language towards one of its members, and relating to the official acts of the said justice." It is not, we believe, denied that the commission of an indictable offence by an attorney is such a misbehavior in his office as will justify any court in disbaring him, nor do we understand the Supreme Court of the United States to intimate any such doctrine; but the action of the court must be based on a notice to the attorney that he is to be punished for *misbehavior*, and where the notice speaks only of *contempt*, though it recite all the facts of his actual conduct which is to be investigated, and though, upon return of the rule, he file an answer covering the whole controversy, and is heard in his defence upon all questions of fact as well as law, yet the judgment of the court shall not stand, because it does not rest on a notice relating *in terms* to *misbehavior*—a decision we think, with all respect, in which technical accuracy is maintained at the expense of substantial justice.

On January 26th, 1869, the Supreme Court of the District

rescinded its order disbarring Mr. Bradley, Chief Justice CARTER, in behalf of the court, saying that this was done in obedience to the supremacy of authority, and protesting, with considerable warmth, against the reasoning as well as the jurisdiction of the Supreme Court of the United States in the matter. He then announced a further order that no attorney who had, or should thereafter be suspended or disbarred by any of the courts organized under the Act of 1863 (the Criminal Court of the District, &c.), for contempt of court, or professional misconduct, should be allowed to practise in any of the other courts organized under that act.

On the calling of the first case, Mr. Bradley inquired whether the order just made would prevent him from practising in this court, as he desired to be heard in the case just called. The Chief Justice replied that the court would consider whether the order affected Mr. Bradley or not, and would, in the mean time, pass the case called. A few days afterwards Mr. Bradley presented a paper to the court purporting to be an apology, but which the court, through WYLIE, J., in an opinion delivered February 1st, 1869, declined to consider as such. Here, at the present writing, the case rests.

The public attention drawn to this case, and the blundering or mischievous perversions of the decision of the Supreme Court of the United States, by gossiping newspaper correspondents, have induced us to make the foregoing careful statement from official sources. With no acquaintance, prejudice, or favor in regard to either party, we feel constrained to say that the facts, as they stand, are eminently discreditable to both.

That the conduct of Mr. Bradley, on August 10th, both in the court-room and in the car, was a very flagrant contempt of court at common law, is undeniable. Much allowance is to be made for the original difficulty on July 2d, when both judge and counsel were wearied, and their tempers irritated by a session of two months over a judicial farce that seemed interminable. Mr. Bradley's temper is bad enough at most times, it would appear, as it is said by Judge WYLIE that he had already been fined for insulting, in open court, and charging another judge of this same court with falsehood, but no infirmity of temper can be pleaded in palliation of a challenge to a judge for matters growing out of his action while on the bench, and no challenge can be called hasty



which is written on the 6th, not delivered until the 10th, and is for an offence which occurred more than five weeks before. The offence of striking a judge was high treason at common law, and even in the great Act of Edward 3, defining and limiting the number of treasons, it was still classed as the highest crime known to the law to kill a judge in his place. No heavier blow can be struck at the foundations of civil liberty and social order, than the introduction, however remotely, of the element of personal insecurity among the considerations by which a judge shall regulate his judicial action. The delivery of a challenge to any one within the District of Columbia is an indictable offence, under the laws of the United States, and, morally considered, it was raised to a heinous crime by the relations of the parties in this case. This is a matter of the very highest professional concern, and while we would not advocate anything that could in the least degree lessen the proper independence of the bar, yet the perfect independence of the judiciary is a matter of far greater moment. We cannot, therefore, avoid the expression of our regret that so serious a matter should have been allowed to get lost in a maze of side issues and small technicalities.

It is due to Mr. Bradley to say that, in his answer to the rule in the Supreme Court of the District, he endeavors to explain that the letter of August 6th was not a challenge, but we have not been able to see the force of his explanation. That the letter meant a challenge, no one, having the least knowledge of the English language as used for the purposes of hostile encounters, can entertain a moment's doubt. It was a challenge, and was intended to be so understood, and it is puerile and evasive to call it anything else.

While, however, we consider Mr. Bradley to have been most in the wrong, yet the conduct of Judge FISHER is liable to severe censure. Mr. Bradley's account of the first difficulty, on July 2d, puts the judge altogether in fault, and though we may fairly assume that this account is colored by the passion of the quarrel, yet it attributes language and behavior to the judge, in the presence of Mr. Phillips and other gentlemen, which, being uncontradicted, must be assumed as substantially true. A man who, under any provocation of mere words, calls another "a scoundrel and a coward," and dares him to "step out" to a pugilistic encounter, lacks, to speak mildly, the temper which qualifies him

for judicial station. The truth is, and it is quite time it should be plainly spoken, that the court, whether through its fault or its misfortune, has been an actor in several scenes which have impaired public confidence in it as a judicial tribunal. We have called the Surratt trial a judicial farce—it was a farce, but of that melancholy kind at which thoughtful people do not laugh; and the disgust which was felt at the trial of Mary Harris, in the same court, is still fresh in the professional mind.

Trials at the Old Bailey, or The Tombs, and kindred courts, are always the occasions on which judicial and forensic proprieties are most ignored, but it is particularly unfortunate when a court which descends to the Old Bailey style, bears a title so similar to that of the great tribunal whose reputation is of national importance. We hope that Congress will speedily change the name of the Supreme Court of the District of Columbia, so that the Supreme Court of the United States, already menaced with sufficient dangers of its own in the perilous field of legal politics, shall not be loaded with any additional burdens of popular distrust.

J. T. M.

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## RECENT AMERICAN DECISIONS.

### *Supreme Court of Pennsylvania.*

#### LORIN PALMER v. GEORGE S. HARRIS.

A trade-mark having upon it a false statement which did not, and could not produce any effect upon the purchasers of the article, is nevertheless so tainted by the falsehood that equity refuses to protect it.

A trade-mark for a brand of segars, manufactured in New York, had upon it, in Spanish, words, which interpreted into English, mean: "Factory of segars from the best plantations de la Vuelta Abajo, calle del Agua, Habana." Equity refused, on the ground of the falsehood, to enjoin a printer from counterfeiting the device, and supplying the trade with his imitations.

THIS was an appeal from a decree of the Court of Common Pleas of Philadelphia, which refused to grant an injunction to restrain Harris from counterfeiting Palmer's trade-mark.

The facts were that Palmer, a dealer in segars, designed a label for a particular brand which he manufactured, and which had acquired an extensive popularity in the United States as the

"Golden Crown." The label contained a golden crown surrounded by a green wreath, and underneath this the words,

"FABRICA DE TABACOS DE LAS MEJORES VEGAS,  
DE LA VUELTA ABAJO,  
CALLE DEL AGUA, No. 73, HABANA."

Harris, the defendant, printed an imitation of the design, containing the same words, and supplied dealers in the segar trade with the counterfeits, and thus enabled them, by attaching the imitation to their own segars, to avail themselves of the reputation which Palmer had acquired, and deprive him of the exclusive use and benefit of his trade-mark. Palmer's design was copy-righted under the Act of Congress, February 3d 1831, 4 Stats. 436, § 1. The imitation was not denied, but the defence was, that the segars being made in New York, the label contained a false and fraudulent representation, which equity would not protect. The court below dismissed the bill.

*James Parsons*, for the appellant.—A trade-mark is a species of property (*Bradley v. Norton*, 33 Conn. 157), and entitled to protection (*Colladay v. Baird*, 4 Phila. 139; *Burnett v. Phalon*, 11 Tiff. (N. Y.) s. c. 3 Tr. App. 167), by injunction against one who imitates the trade-mark so nearly that a purchaser might be misled; a substantial similarity is sufficient: *Bradley v. Norton*, *supra*; *Coats v. Holbrook*, 2 Sand. Ch. 586, and cases cited; *Taylor v. Carpenter*, Id. 603, s. c. in error 611; *Partridge v. Heuck*, Id. 622; *Williams v. Johnson*, 2 Bosw. 1; *Stokes v. Landgraff*, 17 Barb. 608; *Amoskeag Manufacturing Co. v. Spear*, 2 Sand. S. C. 599; *Wolfe v. Gouland*, 18 How. Pr. R.; *Clark v. Clark*, 25 Barb. 76; *Brooklyn White Lead Co. v. Masury*, Id. 416; *Walton v. Crowley*, 3 Blatch. C. C. 440.

The assertions on the label are in a foreign language, and the law presumes, until the contrary is proved, that they were not understood, at least when to assume that the statements were comprehended would charge the person who uttered them with liability: 2 Starkie on Slander 52; Cook on Defamation, pp. 14, 87.

If the words were understood, positive knowledge of what he was buying was nevertheless brought home to every purchaser, and their effect neutralized by, 1st. Palmer's public declaration

that he was a citizen or permanent resident of the United States, and consequently that the segars which he manufactured were a domestic product, involved in taking out a copyright of his design: *Casey v. Collier*, 56 Niles' Reg. 262, Judge BETTS, 1839; *Keene v. Wheatley*, 9 Am. L. R. 45, Judge CADWALADER, 1860.

2d. The internal revenue and customs regulations. The internal revenue stamp on the box of segars states the kind, quantity, date of inspection, *collection district they are manufactured in*, and the inspector's name: Act of Congress, July 13th 1866; Boutwell's Manual, p. 51, § 91. And the law imposes upon the purchaser, under a penalty, the duty of ascertaining that the inspection has been made: *Id.* § 92.

3d. The requirement, which excludes the possibility of mistake, that *imported* segars must be inspected and stamped before removal from public store or bonded warehouse: Act of Congress, July 28th 1866, Stats. at Large, 1865-6, p. 328.

The assertions, therefore, are innocent in the effect which they produce upon the public. In *Edelsten v. Vick* an article was described as "patented," which signified that it was protected by a patent, though the patent had, in fact, expired. Vice-Chancellor WOOD drew the inference that the dealers in the trade knew that the term had expired, and were not injured by the falsehood; he did not enter into and canvass the motive which induced the plaintiff to assert the untruth: 11 Hare 78, 1853. And in *Dale v. Smithson*, the plaintiff put upon his trade-mark a fictitious name as that of the manufacturer of the article. The court decided that, *as the public was not in fact deceived*, the plaintiff was entitled to their protection: 12 Abbott Pr. R. 237. Until a purchaser has been deceived, no act has been done which gives the law a pretext to interpose. A naked intention to deceive is not a ground for legal action of any kind—least of all for the infliction of a penalty or forfeiture. Intention by itself, unembodied in an act, does not come within the purview of jurisprudence; it is only when coupled with an act that it becomes an important element in determining its character: 2 Austin's Jurisprudence 147; Lord MANSFIELD, *R. v. Scofield*, Cald. 397; *R. v. Higgins*, 2 East 5; Lindley, Juris. xxx., 2; *Smith v. Bowler*, Disney, Rep. 520-26.

Equity lends its aid to make a legal right more effectual: *Farina v. Silverlock*, 6 De G. M. & G. 214; s. c. 39 E. L. & E. 514, 1856. If the title is contested, equity suspends its aid until the

legal right is established : *Pidding v. How*, 8 Simons 477 ; *Singleton v. Bolton*, 3 Doug. 293 ; *Perry v. Truefitt*, 6 Beavan 66. This is the practice ; under liberty granted by Vice-Chancellor WIGRAM, *Rodgers v. Nowill* was tried in 1848 : 5 M. G. & Sc. 109.

A test case at law by the purchaser against the proprietor would require a false representation by the proprietor, his knowledge of its falsity, ignorance on the part of the purchaser that the representation was false, and his acting upon it in the belief that it was true, and injury resulting from such action : *Sykes v. Sykes*, 3 B. & C. 541, 1824 ; s. c. 5 D. & R. 292 ; *Singleton v. Bolton*, *supra* ; *Crayshaw v. Thompson*, 4 M. & G. 357, 1842 ; *Rodgers v. Nowill*, *supra* ; *Behn v. Kemble*, 7 C. B. N. S. 260 ; Eden on Injunction, by Waterman, 25, note 1.

There can be no deception until somebody is deceived : 1 Starkie on Evidence 374 ; Adams's Equity 176 and note ; Story's Equity, § 191, 202-3 ; Broom's Maxims 358.

When the legal title is established at law, as in *Stewart v. Smithson*, 1 Hilt. 119, equity enforces the right : *Dale v. Smithson*, *supra* ; which is vested, and can be forfeited only on legal ground. It is better fortified than the right to a contract which equity rescinds only when an action of deceit could be maintained at law : Sugden on Property, in H. of L. 597-8-9, 406-8, 64 L. L. 398-9 ; Sugden on Vendors 180, ch. 5, § 111, pl. 41 ; 204, ch. 5, § 5, pl. 3 ; Fry on Specific Performance, ch. xii., p. 191 ; xiii., 206, L. L. 100.

The result of the broad proposition that a false statement vitiates the title would be, 1st. To forfeit in this kind of property, though in no other, a man's title, for the slightest taint of fraud.

2d. To give the benefit of this penalty to a confessed pirate, in spite of the Act March 8th 1855, Pamph. L. 514, Purd. Dig. 1155.

3d. To put outside the pale of law property which has at any time been falsely represented in the market, and thus the object of law, to preserve society from internal disorganization, is, to the extent of this excluded property, frustrated.

*Theodore Cuyler*, for appellee.—Protection is asked from a court of equity for a tradesman's label which is confessedly false, and both calculated and *intended* to deceive and mislead the public.

It is gravely argued that this label, however intended, does not

in fact deceive, because of the words obscurely printed below, "Entered according to the Act of Congress."

So, too, it is said the law requires an imported article to have upon the boxes certain marks of inspection, the absence of which from these boxes shows the label is untrue, and prevents it from deceiving the purchaser.

But the motive is still present, and the fact too, even if this be so—that the unwary and the ignorant are, in fact, deceived and *intended to be deceived*.

The authorities upon this question are very clear and well settled.

Mr. Daniels, speaking of trade-marks, says: "With respect to these cases, it may lastly be observed, that the remedy given in equity is discretionary, and will be withheld if there has been any improper conduct on the part of the plaintiff. On this principle the court has refused to grant an injunction, in the first instance, where the plaintiff has made false representations to the public concerning the article which he seeks to protect:" 3 Daniel's Ch. Practice, p. 1755; and again, p. 1754: "He cannot, therefore, be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person."

2 Story's Eq. § 951; *Perry v. Truefit*, 6 Beavan 66; *Millington v. Fox*, 3 M. & K. 338; *Clark v. Freeman*, 11 Beav. 112; *Hogg v. Kirby*, 8 Ves. 226; *Walcott v. Walker*, 7 Id. 1; *Pidding v. How*, 8 Simons 477.

[MR. JUSTICE READ.—There is a recent case decided upon this point by the House of Lords, which has not been mentioned, *The Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. 523.]

In *Fowle v. Spear*, 7 Penna. Law Journal 176, the United States Circuit Court refused to protect by injunction the manufacturers of *quack* medicines. A court of equity will not protect worthless articles, or countenance fraud or immorality.

*Parsons*, in reply.—*The Leather Cloth Co. v. The American Leather Cloth Co.*, cited by Mr. Justice READ, was decided upon the point of similarity; the resemblance was not sufficiently close to make the defendants' stamp a colorable imitation.

There is no doubt that courts of equity refuse to protect quack medicines and noxious drugs: *Woodruff v. Smith*, 48 Barb. 438;

but in such cases no attempt is or could be made to anticipate and counteract the evil effect; the antidote does not accompany the poison. But in this case it is demonstrated that the assertion never in a single instance produced any effect.

The opinion of the court was delivered by

SHARSWOOD, J.—The plaintiff, according to the statements of his bill, is the manufacturer of a cigar, known as the “Golden Crown,” and he has devised a trade-mark, which he uses in its sale. He charges that the defendant, who is a printer by trade, has counterfeited this mark, and sells copies of it to persons engaged in the manufacture and sale of cigars, by whom they are used to his damage. The answer of the defendant admits these allegations; but sets up as a ground for the non-interference of the court, that the articles thus sold by the plaintiff were manufactured in the city of New York, and that the trade-mark in question contains upon it the declaration that they are the product of a “factory of cigars from the best plantations de la Vuelta Abajo, Calle del Agua, Habana.” The case having been heard on bill and answer, the bill was dismissed with costs.

The maxim which is generally expressed, “He who comes into equity must come with clean hands,” Snell’s Principles 33, but sometimes, in stronger language, “He that hath committed iniquity shall not have equity,” Francis’ Maxims 5, has been often applied to bills to restrain by injunction the counterfeiting of trade-marks. The ground on which the jurisdiction of equity in such cases is rested, is the promotion of honesty and fair dealing, because no one has a right to sell his own goods as the goods of another: *Croft v. Day*, 7 Beavan 232. “It is perfectly manifest,” said Lord LANGDALE, “that to do this is a fraud, and a very gross fraud.” It is plain that there is no class of cases to which the maxim referred to can be more properly applied. The party who attempts to deceive the public by the use of a trade-mark, which contains on its face a falsehood as to the place where his goods are manufactured, in order to have the benefit of the reputation which such goods have acquired in the market, is guilty of the same fraud of which he complains in the defendant. He certainly can have no claim to the extraordinary interposition of a tribunal, constituted to administer equity, for the purpose of securing to him the profits arising from his fraudulent act.

Thus, in *Pidding v. How*, Simons 477, the plaintiff had made a new sort of mixed tea and sold it under the name of "Howqua's Mixture;" but as he had made false statements as to the teas of which his mixture was composed, and as to the mode in which they were procured, the court refused an injunction; Vice-Chancellor SHADWELL remarking, "it is a clear rule laid down by courts of equity not to extend their protection to a person whose case is not founded in truth." In *Flavel v. Harrison*, 10 Hare 467, an injunction was refused, when an article was sold by the name of Flavel's Patent Kitchener, for which there never had been a patent. In *Leather Cloth Company v. American Leather Cloth Company*, 11 House of Lords Cases 533, though decided on the ground that the mark used by the defendants was substantially different from that of the plaintiffs, yet it may be fairly inferred from all the opinions that, if necessary, the decree of Lord Chancellor WESTBURY would have been affirmed on the broader ground. Thus, a company which had gained reputation by a particular manufacture, on discontinuing their business, transferred their stamp or trade-mark, which indicated them as the manufacturers, to other parties; and it was the opinion expressed that such assignees would not be protected in equity in the use of that mark on goods manufactured by themselves. "So," said Lord CRANWORTH, "in the cases of bottles or casks of wine stamped as being the growth of a celebrated vineyard, or cheese marked as the produce of a famous dairy, or of hops stamped as coming from a well-known hop-garden in Kent or Surrey, no protection would be given to the sellers of such goods, if they were not really the produce of the place from which they purported to come." It is contended, however, that this case is different, because there were marks or words used with these labels inconsistent with the idea that they were held forth as manufactured in Havana. On the label is printed, "Entered according to Act of Congress, A. D. 1858, by Lorin Palmer, in the Clerk's Office of the Southern District of New York." Apart from the fact that this is in such very small type, and so abbreviated, that it would probably escape the observation of every one whose attention was not specially directed to it, a circumstance which rather strengthens the evidence of an intention to mislead the public, what is there in the fact that the design or engraving had been copyrighted in the United States, inconsistent with the



declaration that the cigars, contained in the box, were manufactured in Havana of Cuban tobacco? But, again, it is said that the United States internal revenue stamp would at once undeceive the purchaser, there being a difference between the stamp used for articles imported and for those of domestic manufacture. Few persons would stop to notice this difference; and besides, as it is alleged, the trade-mark is pasted on the inside of the lid, and when the box is open for the purpose of retailing, the trade-mark is brought directly in the view of persons wishing to purchase, and the revenue stamp is not seen unless the lid is turned down, and the box examined on the outside. It is contended, further, that the falsehood is in a foreign language, of which it is to be presumed that the plaintiff's customers are ignorant. Yet there is certainly enough to convey to every one, who can read, that the cigars are from "Havana." It is true, that when a slander is uttered in a foreign tongue it is necessary, in an action for damage, to prove that the hearers understood the language; for it will not be presumed that, being ignorant of the meaning of the words, they afterwards repeated them to those who understood them: 2 Starkie on Slander 52; but there is no such rule in an action for a libel in a foreign language, for *littera scripta manet*; that may be read and explained by those who do, to those who do not understand it. The case of a written or printed libel has a much closer analogy to the point before us than that of spoken slander. But above all this, it is not necessary that any one person has been actually deceived or defrauded; it is enough that it is a misrepresentation, calculated to have that effect on the unwary and unsuspecting.

Decree affirmed, and appeal dismissed at the costs of the appellant.

The right to a trade-mark was recognised at an early period in the English law. In *Southern v. How*, decided in the 15th year of James I., Mr. Justice DODDERIDGE cited a case in the time of Queen Elizabeth, which he thus stated: "An action upon the case was brought in the Common Pleas by a clothier,—that, whereas he had gained great reputation for his making of his cloth, by reason whereof he had great utterance, to his

great benefit and profit; and that he used to set his mark to his cloth whereby it should be known to be his cloth; and another clothier perceiving it, used the same mark to his ill-made cloth on purpose to deceive him; and it was resolved that the action did well lie:" Popham 143-4. The different versions of this case are compared in a note at the foot of page 388 of 4 M. & G.'s Reports. It is only, however, within a compara-

tively recent period that the employment of trade-marks has become a general usage. And this increase in the employment of them has, without doubt, arisen from the new use to which trade-marks are at present applied. They no longer serve simply to identify the article upon which they are placed; they also serve as advertisements; and it is the facility with which they can be used as a medium to advertise and bring the article into notoriety, that causes them to come into such general vogue.

It is remarkable, in view of this popular characteristic which trade-marks have acquired, that *Palmer v. Harris* should be the first case of the kind decided by the Supreme Court of Pennsylvania, which has, as yet, been published.

I. As the report of the principal case, taken with the opinion delivered in it, furnishes a full résumé of the points which were presented for adjudication, and were decided by the court, it is unnecessary to recapitulate them. Especially is this the case when every position which was taken to parry the application of the general principle to the particular facts in hand, was effectually turned by the breadth of the proposition which was enunciated. The eminent judge thus sums up the doctrine in the last sentence of his opinion: "But above all this it is not necessary that any person has been actually deceived or defrauded; it is enough that it is a misrepresentation calculated to have that effect on the unwary and unsuspecting." The word "calculated" in this sentence thus taken out of its context, is ambiguous, but restored to its place in the opinion, it means, if it is to have any force whatever, that the party designed to misrepresent, and that it is entirely immaterial whether that design was frustrated or carried into effect. Though it remain a naked intention, never executed, the penalty is the same as if the design were realized, and a purchaser

were deceived. The meaning of the phrase might be thus rendered: It is unnecessary that any person has been deceived or defrauded by the misrepresentation, it is enough that there was an intention to deceive, though it be demonstrated that the intention was never executed, but always remained a bare notion. This is a broad proposition which deserves consideration.

It must be borne in mind, that the proprietor of the trade-mark has a vested right of property at law, and can assert his legal title against any invader upon his domain. No counterfeiter or pirate can contest his title on the ground of its being a fraud upon the public; the only person who is permitted at law to raise this objection is the purchaser who has been deceived, and he can recover damages only to the amount he has actually suffered in consequence of the deception. The anomaly is then presented of a perfect legal title, which might, under the Pennsylvania Statute of March 8th 1855, be asserted for the purpose of putting the counterfeiter in prison, and subjecting him to a heavy fine in addition, being forfeited in a court of equity for the benefit of the counterfeiter.

The Roman maxim, *Boni judicis ampliare jurisdictionem*, has certainly been acted upon persistently in this class of cases. The chancellors originally did not presume to decide upon the validity of the title; they referred that question to the courts of law, and during the interval whilst awaiting a determination they suspended their action. This was the origin of the jurisdiction which now overshadows the law. Mr. Justice HILTON, in an interesting historical review of the authorities, has traced the development of this trunk of equity jurisdiction back to its original bulb, and tried, though in vain, to arrest its future expansion: *Dale v. Smithson*, 12 Abb. Pr. R. 237.

Lord WESTBURY, who is not content

to judge men's conduct, but must needs pass sentence upon the motives which they entertain but do not act upon, is the champion for immaculate purity. He says: "Where any symbol or label, claimed as a trade-mark, is so constructed or worded as to make or contain a distinct assertion which is false, I think no property can be claimed in it; or, in other words, the right to the exclusive use of it cannot be protected. The sale of the article stamped with a false statement is *pro tanto* an imposition upon the public; and, therefore, in the case supposed, the plaintiff and the defendant would be both *in pari delicto*." To the objection that any buyer of ordinary discernment would perceive the falsehood, and therefore would not be deceived by the statement, he replied: "I cannot receive it as a rule either of morality or equity that the plaintiffs are not answerable for a falsehood because it may be so gross and palpable that no one is likely to be deceived by it. If there is a wilfully false statement, I will not stop to inquire whether it was too gross to mislead." And he accordingly held that the plaintiffs, who had bought out the Crockett International Leather Cloth Company and had made use of their stamps which reasserted the names of the original manufacturers, the place of their manufactory, and asserted the facts which were untrue, that the cloth was tanned, and the process by which this was done had been patented, could not prevent the defendants from using the same trade-mark, as the plaintiffs were condemned by the principles to which they appealed: *The Leather Cloth Co. (Limited) v. The American Leather Cloth Co. (Limited)*, 33 L. J. R. (1864) 199.

The present Lord Chancellor, HATH-  
ERLY, takes the view that motives or intentions, unless they are incorporated in an act and thereby produce an effect upon somebody to his detriment, do not come within the vision either of a court

of law or equity. In *Morgan v. McAdam*, the plaintiffs applied the term patent to crucibles which had never been patented. In delivering the opinion he justifies his decision in *Edelsten v. Vick*, saying: "Where a person uses the term 'patent' in a manner which is innocent,—by which I do not mean innocent in the inmost recesses of his mind (for, of course, I cannot consider whether or not these gentlemen supposed they had a patent when in truth they had none at all), but innocent in the effect it may produce upon the public;—what the court must consider is this, how far in protecting him in assuming a title which he has no right to assume, the public are likely to be deceived." He very properly refuses to draw the inference of fact that no one was deceived, and states the reason which discriminates the case from *Edelsten v. Vick*, where he did draw the inference of fact: "I cannot assume in the plaintiffs' favor that everybody who bought these articles must be taken to have such knowledge of the trade that he would know at once that there never had been an English patent respecting it, because, if that is so, why was that term ever adopted at all?" 36 L. J. R. Ch. (1867) 228. The position taken by the present Lord Chancellor accords with the received opinion that neither courts of law nor of equity are courts of casuistry. This has heretofore been considered a fundamental principle of jurisprudence, and Austin, a great authority on the abstract and elemental principles of law, states the proposition with his accustomed strength and clearness: "Intention is not of itself wrong, or breach of duty or obligation, nor does it of itself place the party in the predicament of guilt or imputability. In order that the party may be placed in that predicament his intention \* \* must be referred to an act, forbearance or omission of which it is the cause." 2 Jurisprudence

147. It has been the constant boast of English and American lawyers that our system of law did not attempt to judge the conscience of mankind, and this abstention was vaunted as an indication of our advance in intelligence. The endeavors of the church, during the middle ages, to reduce the impulses of the conscience to a set of formulas, resulted in such a perversion of reason and justice that the world abandoned the delusive scheme. Could Chief Justice GIBSON return to his illustrious seat, how startled would he be at the overthrow of what he considered the grand characteristic of his favorite science, the practical wisdom which judges men by their actions and not by their thoughts!

This question becomes more important in consequence of the habit, which is now very general, of using the trade-mark as a medium of advertisement. Its primary object is to identify the article; to indicate where, by whom, and at what manufactory it was manufactured. But its secondary purpose is to declare in an announcement, which is published on the trade-mark, the character of the article. It is the peculiar hardship of the decision rendered in the principal case to forfeit the established and vested right to a trade-mark for the slightest misrepresentation. Such severity is not enforced in any other branch of equity; on the contrary, in the case which furnishes the closest analogy to the forfeiture of a trade-mark, the rescission of a contract, equity refuses to deprive a party of his contract unless a case has been made out upon which an action of deceit could be maintained at law. This, it will be observed, is the rescission of a contract for the benefit of the party who has been deceived, and yet, even between the parties, equity requires a legal ground for the destruction of the legal title. This is consonant with the original doctrine of equity in regard to trade-marks; it suspended its action

until the law had pronounced a decision, and then it lent its aid to make the legal right more effectual.

It is true that slighter grounds will move a court of equity to refuse to carry out, than will induce them to set aside a contract. And as they decline to formalize the reasons of their non-action in the case of a request to enforce the specific performance of a contract, it is unsettled what range of considerations they take into view; though it is generally asserted that they limit their attention to the mutual rights of the two parties before them. If this be the extent of their vision, the administration of substantial justice between the parties can certainly excite no animadversion, nor can it furnish a parallel for the forfeiture of a legal right which no one injured has contested, and on the hypothesis assumed by the learned judge, if not proven by the facts, no one is in the position to contest, as no one could be injured.

II. The learned judge who delivered the opinion of the court, placed the jurisdiction of equity upon the ground of fraud. His language is: "The ground on which the jurisdiction of equity, in such cases, is rested, is the promotion of honesty and fair dealing, because no one has a right to sell his own goods as the goods of another: *Croft v. Day*, 7 Beavan 232. 'It is perfectly manifest,' said Lord LANGDALE, 'that to do this is a fraud, and a very gross fraud.'" This was, perhaps, the received opinion in the time of Lord LANGDALE, but it has long since been exploded. Lord CRANWORTH, in 1856, stated the ground to be the inadequacy of the legal remedies, and the duty of equity to administer preventive justice in order to make more effectual the legal right: *Farina v. Silverlock*, *supra*. This dictum of Lord LANGDALE was cited with approval by the Vice-Chancellor who originally heard the case of the

Leather Cloth Company, and this resuscitation led Lord WESTBURY to exert his strength and put an end to the theory. His demonstration is such a neat piece of reasoning that it deserves to be known, independent of the important principle which it establishes. He says: "First, the goods of one man may be sold as the goods of another without giving to that other person a right to complain, unless he sustains or is likely to sustain from the wrongful act some pecuniary loss or damage. Thus, in the case of *Clark v. Freeman*, 11 Beav. 112, the eminent physician, Sir James Clark, applied for an injunction to restrain a chemist from publishing and selling a quack medicine under the name of 'Sir James Clarke's Consumption Pills;' but the court refused to interfere because it did not appear that Sir James Clarke had sustained any pecuniary injury. Secondly, it is not requisite for the exercise of the jurisdiction that there should be fraud or imposition practised by the defendant at all. The court will grant relief although the defendant has no intention of selling his own goods as the goods of the plaintiff, or of practising any fraud either on the plaintiff or the public. If the defendant adopts a mark in ignorance of the plaintiff's exclusive right to it, and without knowing that the symbols or words so adopted and used are current as a trade-mark in the market, his act, though innocently done, will be a sufficient ground for the interference of a court, as is plain from the decision of Lord COTTENHAM in the case of *Millington v. Fox*, to which I entirely assent, and from the learned Vice-Chancellor's own opinion in the case of *Welch v. Knott*, 4 Kay & J. 747, 751. Imposition upon the public, occasioned by one man selling his goods as the goods of another, cannot be the ground of private action or suit. In the language of Lord THURLOW, in *Webster v. Webster*, 3 Swanst. 490 n., fraud upon

the public is no ground for coming to this court. It is indeed true that unless the mark used by the defendant be applied by him to goods of the same kind as the goods of the plaintiff, and it is in itself such that it might be, and was, mistaken in the market for the trade-mark of the plaintiff, this court will not interfere, because there is no invasion of the plaintiff's right; and thus the mistake of the buyers in the market, under which they, in fact, take the defendant's goods as the goods of the plaintiff, that is to say, imposition upon the public, becomes the test of the property in that trade-mark having been invaded and injured, but it is not the ground on which the court rests its jurisdiction.

"The representation which the defendant is supposed to make, that his goods are the goods of another person, is not actually made otherwise than by his appropriating and using the trade-mark which such other person has the exclusive right to use in connection with the sale of some commodities; and if the plaintiff has an exclusive right so to use any particular mark or symbol, it becomes his property for the purposes of such application, and the act of the defendant is a violation of such right of property, corresponding with the piracy of copyright or the infringement of a patent. I cannot, therefore, assent to the *dictum* that there is no property in a trade-mark. It is correct to say that there is no exclusive ownership of the symbols which constitute a trade-mark apart from the use or application of them, but the word 'trade-mark' is the designation of marks or symbols when applied to a vendible commodity, and the exclusive right to make such user or application is rightly called property.

"The true principle, therefore, seems to be, that the jurisdiction of the court in the protection given to trade-marks rests upon property, and that the court interferes by injunction because that is

the only mode by which such property can be effectually protected. The same things are necessary to constitute a title to relief in equity in the case of the infringement of the right to a trade-mark as in the case of the violation of any other right of property. First, the plaintiff must prove that he has an exclusive right to use some particular mark or symbol in connection with some manufacture or vendible commodity; and secondly, that this mark or symbol has been adopted or is used by the defendant so as to prejudice the plaintiff's custom and injure him in his trade or business." 33 L. J. R. Ch. (1864) 199; *Hall v. Barrows*, 33 L. J. R. (1864) 204, 207-8.

*Millington v. Fox* is so well established that a compromise with the proprietor of a trade-mark by a brick-maker who had used it unwittingly at the instance of a customer, was considered the settlement of a legal liability, and the customer was compelled to reimburse him the amount of his expenditure: *Dixon v. Fuocus*, 3 E. & E. (1861) 537.

Had the learned judge in the principal case viewed the trade-mark as a right of property, it may be doubted whether he would have been prepared to go the length which Lord WESTBURY went, and forfeit the title on purely moral grounds.

J. P.

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*Supreme Court of Vermont—General Term, Nov. 1868.*

DANIELS v. NELSON.

The doctrine of *fraud in law* as applicable to change of title in personal property without change of possession is merely a kind of rule of evidence prescribing what facts proved shall be held to conclusively show the existence of fraud, and thus creating a kind of estoppel *in pais*.

The rule rests upon grounds of policy only, and its application has been limited to creditors and *bond fide* purchasers. It does not apply in favor of a state or county levying a tax.

Therefore, a chattel belonging to A. cannot be levied upon for a tax due by B., although it formerly belonged to B. and still remains in his possession.

THIS was replevin of a mare that was distrained by the defendant on a tax-warrant for a *poll-tax* against the plaintiff's father, that being the only tax against him. The County Court found the legal title to the property to be in the plaintiff, as between him and his father, by a contract made in good faith, and not fraudulent *in fact*. But the court further found and held that the ostensible ownership and possession were so far in the father as to render the mare subject to levy for the tax, even if she would not have been if the plaintiff had taken and kept the exclusive possession and claim of title in himself.

*Heath & Reed*, for plaintiff.

*Redfield and Gleason*, for defendant.

Opinion delivered by

BARRETT, J.—The question is directly presented, whether the doctrine of *fraud in law* is applicable in this case, so as to subject the property to the levy made. The several English statutes, the substance and spirit of which are embraced in our own, on the subject of fraudulent conveyances, are designed to protect creditors and *bond fide* purchasers; and the *fraud*, which gives occasion for those statutes, looks exclusively to such creditors and purchasers; and, moreover, they contemplate actual fraud, both in intent and act. The doctrine, persistently adhered to in Vermont, of *fraud in law*, does not give any additional scope either to the statutory or common-law operation of *fraud*. That doctrine works in subordination to such law, and adopts a particular mode of determining the existence of the vitiating fraud in the given case. In a sense, it propounds a kind of rule of evidence, prescribing what facts proved shall be held to show the existence of such fraud. It says to the party—Prove that there was no visible change of substantial, exclusive possession from the vendor to the vendee, and the fraud required by the law to invalidate the sale as against creditors and *bond fide* purchasers will be established.

In many of the states, and, at some periods, in England, the lack of such change of possession has not been allowed to have such conclusive effect; but has constituted matter of circumstantial evidence bearing on the question of actual fraud. The conclusive effect of that fact in this, and some other of the states, has been allowed and adopted as matter, and on the ground, of policy. When the ground and reason of that policy is considered, the proper extent of the application and operation of the doctrine itself will be seen.

Possession—the holding and using of an article of property in the manner of an owner—is a strongly evincive badge of ownership; and when it continues to be exercised upon property by the person who had in fact before owned it, the public and individuals would be warranted in presuming that such ownership was continuing, and in acting accordingly, without making inquiry. Indeed, very few persons would think of making inquiry as to a

change of *title*, unless some apparent change in the possession and use of the property had occurred.

The ownership of property being a leading ground and inducement for credit, as well as for confidence, in dealing with and trading for it, in order to preclude the continued possession of property from inducing an unfounded credit, or leading to a fallacious confidence in making a purchase, the law adopts a kind of conclusive *estoppel in pais*, in favor of creditors and *bona fide* purchasers of the former owner, his continuing in the possession and use in a manner consistent with his continuing still to be the owner of it.

It does this in order, at once and entirely, to relieve the subject of the continued possession of property by the former owner, as a ground of credit and confidence, from the embarrassment that would be likely to, and often does, result from having to settle occult questions as to the real character of transactions between the parties to the pretended transfer of title, when not accompanied by a corresponding change of possession.

In this view it may be regarded as a kind of rule of title and assurance in the pretended vendee. The propriety of the rule is well justified by commercial, as well as by judicial, experience; and we may properly continue to abide by it, as intimated by Judge MATTOCKS, in *Farnsworth v. Shepard*, 6 Vt. Rep. 521, notwithstanding the doubt expressed by Chancellor KENT in his Commentaries, Vol. 2, p. 526 (ed. of 1840), in noting with commendation that intimation.

Now it is obvious that the policy and final cause of the rule cannot be predicated of the case in hand. The party to which the tax is owing is not a *creditor*. The state, the town, the school district, do not give credit by way of trust and confidence. They make an authoritative and arbitrary exaction, and are armed with all the power of the state for its enforcement out of any, and all, of the property of the party taxed, extending even to the enticement of the prison walls, in lack of the property whereof to get satisfaction. In *Johnson v. Howard and Trustee* (Orange Co., March Term 1868), it was held that town taxes could not be deducted in diminution of the liability of the town as trustee of the defendant, under sec. 52, ch. 34, Gen. Stat.

In the present case, as before remarked, the tax was not on account of any property. It was only a poll-tax; that fact itself



indicating it to be likely enough that, not property, but only the person of the party taxed, might be reached by warrant for its compulsory collection.

The view we take of the subject, in its reasons, as developed in its history, is fully sustained by the text-books and the cases. 2 Kent's Com., from p. 515 to 552, inclusive, contains the best summary of the law of the subject that I have seen. It will be found that all the cases in Vermont, beginning with *Mott v. McNiel*, 1 Aik. Rep. 162, and ending with *Houston v. Howard*, 39 Vt. Rep. 55, treat the matter of *fraud in law*—constructive fraud—predicated upon a lack of change of possession, as originating in *policy*, and limited to creditors and *bond fide* purchasers without notice. The doctrine has never been better stated, both as to its grounds and its limit, and its practical operation, than it was by HUTCHINSON, J., in *Mott v. McNiel*; and it has not been departed from in point of principle in any subsequent case that has come to our attention. He says: "A sale of personal property, without change of possession, though it may be valid, as between the parties, is void as to creditors. It is usually termed a fraud in law. \* \* \* This must be a visible substantial change; so that the possession will no longer give a credit to the former owner. \* \* \* If a man actually owns and possesses personal property, the world have a right to presume he remains the owner, so long as he retains the possession. People may well give him credit on account of this property, and when they attach it for his debts, they can hold it."

The ground of the doctrine is strongly developed in *Foster v. McGregor*, 11 Vt. 595, by BENNETT, J., in which it was held that property exempt from attachment and execution was not subject to the rule of fraud in law, for the reason that it did not enable the vendor to acquire a false credit, nor was it against sound policy, as opening a door to fraud; and yet such property is not exempt from distress upon a tax-warrant.

As the present case does not fall within the reason of the doctrine and rule, and as no precedent is shown for applying the rule to such a case, we see no legal reason for subjecting the plaintiff's property to the compulsory payment of his father's poll-tax. No party in interest has been misled. No party in interest could be misled in such a case, by such possession and use of the property

by the plaintiff's father, with the knowledge and permission of the plaintiff, as were shown in this case.

The fact that the defendant levied on it, because of such possession and use, is no element in the law of the subject. It was an experiment on his part to get the tax satisfied. What gives potency to the lack of a change of possession, is its tendency to induce a false credit in the *creation* of claims against the former owner, who still continues in possession,—not that it may induce a party to levy final process upon it in satisfaction of his claim. The case, in this respect, bears a close analogy to one feature of *Turner v. Waldo*, 40 Vt. Rep. 51.

The judgment below is reversed, and judgment rendered in this court for the plaintiff.

The foregoing opinion is certainly reasoned with great fairness and clearness, and as the rule of law declared is one of policy, not altogether dependent either upon principle or analogy, it is difficult to form any very decided opinion in regard to its absolute soundness. It is a question resting too much in the discretion of the court to admit of much controversy, either in regard to its wisdom or its logic. By presuming to affirm the contrary one assumes to erect his own judgment in opposition to that of the court, which, within its sphere, is final and therefore infallible. That is all that is fairly implied in the infallibility of any person or tribunal, that its judgments are final and not subject to revision. And where, in addition to the judgment of any court being final, it is made to rest upon so undefinable a basis, as policy, it becomes impossible to measure its soundness, since we have no common standard of policy in the law until it has been established by common consent, which is not the fact as to the matter in hand.

It may be true that the person or power in whose favor a tax is assessed is not to be regarded strictly in the light of a creditor of the tax-payer. So too a party upon whom a tort is committed,

before judgment in his favor, is not entitled to the benefits of being regarded as a creditor of the tortfeasor. He could not avoid the effect of a conveyance made for the express purpose of avoiding his claim, which would be void under the statute against fraudulent conveyances as to creditors. And he could not claim to recover a penalty inflicted against debtors for fraudulent conveyances, to be recovered only by creditors. This point as to the claimant for damages in tort being entitled to the benefit of the provisions of the statute against fraudulent conveyances was so determined at an early day in Connecticut by a divided court: *Fox v. Hill*, 1 Conn. 295; *Fowler v. Frisbie*, 3 Id. 321.

But after a tort goes into judgment it becomes a debt, and we see no good reason why the relation of debtor and creditor may not fairly be regarded as thereafter existing between the parties to such judgment. That is expressly decided in *Pelham v. Aldrich*, 8 Gray 515, in regard to a bill of costs recovered by defendant in a writ of entry.

We think, indeed, that no one can question that the sheriff may levy an execution issued upon a judgment in an action of tort, upon personal property not so transferred as to vest the title as

against creditors. We do not think any court would be inclined to make any distinction between the rights of judgment-creditors on the ground of the original cause of action. This rule of law, regarding the sale of personal property as incomplete until after a visible substantial transfer of possession to the vendee, is for the security of officers as well as creditors, that there may be some known evidence of title by which they may be able to determine the duty which the law imposes, as to levying on it.

Whether the same rule should be extended to officers making distress for taxes is perhaps not equally clear. The

English rule in regard to distress is far more sweeping than in regard to the levy of a *feri facias*. A distress attaches to all property in the possession of the party in default. That is certainly so in regard to distress for rent in arrear, and there is no reason why the rule should not extend to distress for taxes. The distinction made in favor of creditors in the principal case may be founded upon valid considerations. But we generally feel averse to making distinctions in the law, unless upon grounds which commend themselves to the common mind.

I. F. R.

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*Supreme Court of Alabama.*

MOBILE AND OHIO RAILROAD CO. v. THOMAS.

It is not the absolute duty of a railroad company to furnish a safe engine. Its duty is to use care and diligence to furnish such an engine.

When an injury has occurred to a servant in consequence of a defect in an engine, the burden is on the servant to show negligence in the master, and it is not shifted by the fact that an injury has resulted from a defect.

Notice to the proper officers or servants of the company is notice to the company, and will render it liable unless it uses proper diligence in repairing the defect; but if it has made an effort by a competent servant to repair, it is not liable. Failure to remedy the defect does not conclusively prove negligence on the part of the workman, and if it did, he is a fellow-servant of the plaintiff, for whose negligence the company is not liable.

THE defendant in error, who was plaintiff below, was a fireman in the railroad company's employ. While on duty on a train, the engine broke down from some defect in itself, and the plaintiff was injured. Evidence was given at the trial tending to show that the engine, which was run on a "Mason side-bearing truck," was of a kind known to be unsafe; that this particular one had broken down several times before, and that the assistant-superintendent and master mechanic of the shop had been informed of this when it occurred.

The defendant offered evidence that the side-bearing truck was

safe, and that the foreman of the workshop, a competent mechanic, had repaired this engine, and pronounced it safe.

The jury rendered a verdict for the plaintiff under a charge which is sufficiently set out in the opinion of this court.

*Geo. N. Stewart and P. Hamilton*, for appellant.

*Robert H. Smith*, for appellee.

The opinion of the court was delivered by

A. J. WALKER, C. J.—The first charge given by the court below was as follows: "It was the duty of the defendant to have on the road suitable and proper engines, and to keep them in such condition that unusual risks would not attend those who were employed to perform service on them; and if they did not in this case have such an engine, and the plaintiff was ignorant of any defect in the engine, the burden is on the defendant to show that they used due caution and diligence in the matter." The defendant was liable to its servants for injuries resulting from its negligence. When passengers on a railroad are injured in consequence of a defect in any instrument employed by it, it is a presumption—disputable, but not conclusive—that the injury resulted from negligence: 2 Redfield on Railways 190, § 11; *H. & S. Railroad Co. v. Higgins*, 5 Am. L. Reg. 715; s. c., 1 Redfield on Railways 533, § 131; *Edgerton v. N. Y. Railroad Co.*, 35 Barb. 193; *Curtis v. R. & S. Railroad Co.*, 18 N. Y. 534. But the same principle does not prevail in reference to servants of a railroad, as we shall see. The established doctrine of the law unquestionably is, that the onus of proving negligence is upon the servant: 2 Redfield on Railways 200, § 15; *Perkins v. E. Railroad Co.*, 29 Maine 307; s. c., 1 Am. Railway Cases 144. Our own decision in *M. & O. Railroad Co. v. Jarboe* (not yet reported), and *Steel & Burgess v. Townsend*, 37 Ala. 247, are not opposed to that proposition. In those cases, the question was, whether a loss of goods, or injury to them, was within an exception to a contract of affreightment; and it was held that the onus of proving that the loss or injury came within the exception, was upon the common carrier; that it did not fall within the exception, unless due care and diligence had been used, and that therefore the onus of proving such care and diligence was upon the carrier.

The charge here, however, was not that the onus of proof of

care and diligence was upon the defendant, but that it was *cast* upon it by a failure to have a suitable and proper engine. It bases the proposition that the onus of proof is shifted to the defendant, upon the assumption of its *absolute* duty to have a suitable and proper engine, as contradistinguished from its duty to use due and proper care and diligence to have such engine. Does the law impose upon a railroad corporation such absolute duty to its servants, or does it only impose the duty of using due diligence to have a suitable and proper engine? If the former question be answered in the affirmative, then the defendant guarantees absolutely to its servants the proper quality of all its engines, and it is liable notwithstanding the utmost care and diligence is used. We can perceive no reason to support the conclusion that the badness of the engine could create the presumption of negligence, and have the effect of shifting the onus of proof from the servant to the carrier. If the assumption that it was the absolute duty of the defendant to have a suitable and proper engine be correct, then the court has made an unmerited concession to the defendant, in only deducing the inference that the onus of proof was changed. Upon that assumption he should have drawn the inference of an unqualified liability—and in that view the charge would be too favorable to the defendant, and he could not object to it. Error, therefore, in the charge is shown, and shown only, by maintaining the proposition that the defendant's obligation or duty to its servant was discharged by the exercise of due and proper diligence to have and to keep suitable and proper engines. To impose upon the master a liability for injuries to the servant, resulting from causes against which due care and diligence fail to provide, absolves the servant from the risks necessarily incident to the business in which he is engaged. There are perils incident to the servant's employment against which caution and prudence cannot perfectly guard. Those perils and risks the servant must be presumed to know as well as the master, and when he contracts he must be understood to assume them, and stipulate for compensation proportioned thereto. It is in that the relation of a railroad corporation to passengers differs from its relation to servants. The principle has been so often declared both in England and in this country, that it has ceased to be disputable. *Priestly v. Fowler*, 3 M. & W. 1, the leading case upon the subject, is in reference to the liability of a master to a servant

for any injury received during his transportation upon the master's wagon. Lord ABINGER, in deciding the case, omitting a qualification which seems to have been since engrafted upon the rule, said: "No duty can be implied upon the part of the master, to cause the servant to be safely and securely carried, or to make the master liable for damage to the servant, arising from any vice or imperfection unknown to the master, in the carriage or in the mode of loading and conducting it." The later English cases of *Seymour v. Maddox*, 5 E. L. & E. 265, and *Cough v. Steel*, 24 Id., are to the same effect. In the latter of those cases, it was decided that the owner of a ship was under no obligation to a seaman serving on board, for the seaworthiness of the vessel, and was not liable to the seaman, in the absence of any knowledge of the defect, or personal blame of the master. *Marshall v. Stewart*, 33 E. L. & E., distinctly recognises neglect as the ground of the master's liability to his servant. In the recent case of *Wiggit v. Fox*, 36 E. L. & E. 486, we infer that the doctrine of *Priestly v. Fowler*, as above stated, was recognised. In America, the earliest case touching the subject is *Murray v. Railroad Co.*, 1 McMullen 386, where the liability of a railroad corporation to a servant for an injury received when on its cars was denied, unless there was fault in the master. In *Farwell v. B. W. R. Co.*, 4 Metcalf 49, which is the leading American case in reference to the relation of railroads to their servants, the precise question of the liabilities of a railroad to its servants, for an injury arising from a defective locomotive did not arise, and Chief Justice SHAW, who delivered the opinion, withheld any expression upon the subject. In the later Massachusetts case of *Seaver v. B. & M. Railroad*, 14 Gray 466, the question arose and was decided in a *per curiam* by a court over which the same learned judge presided. The court below had ruled that a railroad was not responsible for an injury to a servant, resulting from a defect in a locomotive unless there was a want of due and reasonable care to provide a safe and suitable engine. The appellate court affirmed, remarking that the instructions to the jury were sufficiently favorable to the plaintiff: 1 Redfield on Railways 530, § 10. This case arrays the authority of the highest court of Massachusetts, including the great name of Chief Justice SHAW, in favor of the proposition that the railroad is not liable in such case, unless there was a want of reasonable care. In *Buzzell v. Laconia Manuf. Co.*, 48 Maine 113, it was ruled (a servant having been injured in conse-

quence of a defective bridge) that the master's liability depended upon the negligence and want of care, and the declaration was held defective for the lack of an averment that the insufficiency of the bridge was known to the defendant or would have been known but for the want of proper care and diligence. In *Noyes v. Smith*, 28 Vermont 59, there was an injury to an engineer resulting from a defect in an engine. It was decided that there does not arise from the relation of master and servant, the duty of furnishing an engine, well constructed and safe, to the engineer, and that where there is no actual notice of defects in an engine, and no personal blame exists on the part of the master, there is no implied obligation on his part that the engine is free from defect or that it can safely be used by the servant. See also to the same effect, *Hard v. V. & C. Railroad Co.*, 32 Vermont 473. In *Keegan v. W. R. Co.*, 4 Selden 175, the liability for injury to a servant, caused by a fault in an engine, was placed upon the established fact of negligence and misfeasance, and the distinction heretofore stated between passengers and servants is declared. There are a number of other decisions in New York to the same effect. *Wright v. N. Y. C. Railroad Co.*, 25 N. Y. 562, reviewing the decision of the Supreme Court, reported in 28 Barbour 80, refers the master's liability to his misconduct or negligence, and in relation to defects in machinery says, knowledge must be brought home to the master and proof given that he was ignorant of the same, through his own negligence and want of proper caution—in other words, it must be shown that he either knew, or ought to have known, the defect which caused the injury: see also *Byron v. N. Y. Tel. Co.*, 26 Barb. 39. In Ohio the rule is, that the master is liable on the ground of neglect, or want of care and diligence: *McGatrick v. Wason*, 4 Ohio St. 566, 575. In Pennsylvania, the proposition that there is a duty, or implied guaranty of the master to the servant, of the suitability and safety of the instruments furnished, is denied: *Ryon v. C. V. Railroad*, 23 Penn. 384. And lastly, this court itself has decided the question in hand. In *Perry v. Marsh*, 25 Ala. 659, it announced its opinion as follows: "In ordinary cases where a workman is employed to do a dangerous job or to work in a service of peril, if the danger belongs to the work he undertakes, or the service in which he engages, he will be held to all the risks which belong either to the one or the other; but where there is no danger in the work or

service by itself, and the peril grows out of extrinsic causes or circumstances, which cannot be discovered by the use of ordinary precaution and prudence, the employer would be answerable precisely as a third person if the injury or loss was occasioned by his neglect or want of care." The perils of service are in this extract divided into two classes, for one of which the master is not responsible at all, while for the other class, in which the peril from a defective engine may be reckoned, he is responsible in the absence of ordinary precaution and prudence. This decision, is also supported by the statement of the law in the older case of *Walker v. Bolling*, 22 Ala. 294.

We obtain the following conclusions from the foregoing collation of authorities: It is not an absolute duty of a railroad to furnish a suitable and safe engine. It is its duty to use due care and diligence to furnish such engine. When an injury has occurred to a servant, in consequence of a defect in an engine, the burden is upon the plaintiff to show negligence, or the want of care and diligence in the defendant corporation. The onus of proof is not shifted to the defendant by the fact that an injury has resulted from the defect. The first charge being inconsistent with these propositions is erroneous.

The proposition of the second charge is, that if the plaintiff's injury was caused by a defect in the engine, not known to him, of which defendant's servants, charged with the duty of receiving notice of such defects, and remedying the same, previously had notice, and if such servants being so notified had previously repaired the engine, but failed to remedy the particular defect, above stated, the defendant would be liable. This charge is obviously correct in assuming that notice to the servants, who were agents of the defendant to receive notice of defects in the engine, would affect the defendant with notice, if it designated one or more servants to receive such notice for itself, upon an established principle of law, notice within the scope of the agency, to the agent, would be equivalent to notice to the principal: *Smith v. Oliver*, 31 Ala. 39; *Wiley Banks & Co. v. Knight*, 27 Id. 336; *Mundine v. Pitts*, 14 Id. 84. The propriety of this portion of the charge, however, is also questioned in reference to the allegations of the complaint. It is contended that under the complaint, the defendant can only be charged on account of a neglect, which consisted of a failure to remedy a defect, *which it would have known but for*



*the want of proper care and diligence*, and not on account of negligence, consisting in a failure to remedy a defect of *which it was legally informed*. This question we leave undecided, because we doubt in reference to it, and on another trial it can be easily avoided by adding another count to the complaint.

Another objection made to this charge is, that it subjects the defendant to liability for a failure of its servants, who repaired the engine, to remedy the defect. The inference of the defendant's liability from such failure of its servant, can only be sustained by the maintenance of the two propositions, that negligence of the servant is a legal conclusion from such failure, and that the master is responsible for the negligence of the servant. If the failure to remedy the defect does not conclusively demonstrate negligence, the proposition of the charge is not correct. If it does demonstrate negligence, still the proposition of the charge is erroneous, unless the master is answerable for the servant's negligence, which has caused an injury to another servant. We consider the charge incorrect in both respects.

An artisan charged with a duty of repairing, within the scope of his handicraft, is not conclusively shown to have been negligent by a failure to remedy some defect, specifically pointed out to him. He may have attempted to remedy it, and exhausted the skill and care of his art, and yet from some defect in material, or some other cause beyond the detection of ordinary caution and care, may have failed to altogether cure the defect. The question of negligence in the mechanic was for the jury, upon the indeterminate fact presented by the hypothesis of the charge.

The question remains, whether, if the mechanic charged with repairing the engine, was negligent in failing to remedy the defect, the defendant is liable for the injury alleged to have resulted therefrom to the plaintiff. This question will arise upon another trial, and must be decided: Is a railroad responsible to one of its servants employed on a locomotive for an injury occasioned by the negligence of others employed in its machine-shop?

This court has twice decided that "when persons are employed by a common employer in the same general business, and one of them is injured by the negligence of the other, the employer is not responsible therefor:" *Cook & Scott v. Parham*, 24 Ala. 21; *Walker v. Bolling*, 25 Id. 294. Of this doctrine, it is said in the former case, that it is too well established both upon English and

American authority to be now controverted." The English authorities, without exception, support this ruling, and Judge REDFIELD, in whose mind some difficulty as to its justice and policy was produced by the reasoning of a Scotch judge, withdraws serious objection to it, if taken with the qualification prescribed in *Wiggett v. Fox*, 36 Eng. L. & Eq. 486; Redfield on Railways 525, § 5, n. 15. That qualification is, that the master is answerable that the servants shall be persons of ordinary skill and care. That qualification has been twice announced in this state. The precise shape of its statement is, that it is the master's duty to use due care in procuring competent servants or officers, and he is responsible for a failure to discharge that duty: *Cook v. Parham*, 24 Ala. 21; *Walker v. Bolling*, 22 Id. 294. With this qualification, the rule above stated, which prevails in England, must be regarded as established in this state. This rule is supported by all the English cases and all the American, with a few exceptions. Finding the question a *res adjudicata* in this court, and the rule thus supported by authority, we might here stop the discussion of the subject, but it will, perhaps, be more satisfactory to notice the meagre array of adverse authority. In Scotland the rule is opposite to that which prevails in England. That rule imposes on the master a duty to his servant not only of furnishing "good and sufficient machinery," but of having "all acts by others whom he employs, done properly and carefully." See *Dixon v. Rankin*, in the Court of Sessions, 1 Am. Railw. Cases 569. In point of authority we must prefer the adjudications of the English to the Scotch courts, if their reasons were in equilibrium; but on account of the reasoning and principle which underlie the English rule, we regard it as much more consonant with justice and public policy than the Scotch rule, which is built up upon the idea of a partial absolution of a servant from the risks, incident in the very nature of things, to his employment. In Ohio and Kentucky, the courts have engrafted upon the rule, prevalent in England, and in most of our states, an exception of the cases where the injured servant was subordinate in grade to, and subject to the authority of the servant from whose negligence the injury resulted: *L. M. R. Co. v. Stevens*, 20 Ohio 415; *L. & N. R. R. Co. v. Collins*, 5 Am. L. Reg. 265; s. c. 1 Redfield on R. 527, n. Judge REDFIELD, in a note to his work on Railways (1 vol. 532), remarks, in reference to that rule, that he

should regard it as more salutary than the present, but admits that the general current of authority is in the opposite direction. Yet, in a previous note, p. 525, the learned author had said that there seemed to be no serious objection to the English rule with the qualification stated in *Wiggitt v. Fox*, 36 E. L. & E. 486. In Indiana the rule has been adopted that the railroad is liable to a servant for an injury to his fellow-servant, when they are employed in different departments: *Gillinswater v. M. & I. R. Co.*, 5 Ind. 339; *Fitzpatrick v. N. A. & S. R. Co.*, 7 Id. 436. In Wisconsin the distinction made in Ohio, Kentucky, and Indiana is repudiated, and the court, boldly confiding in its own convictions, with the encouragement given by the Scotch authority, applies the doctrine of *respondet superior* to the railroad company, where one of its servants has been injured by the negligence of another: *Chamberlain v. M. & M. R. Co.*, 11 Wis. 238. *Scudder v. Woodbridge*, Kelly's (Ga.) R. 195, is not authority against the English rule, which, as we have seen, is adopted in this state. On the contrary it recognises the rule, but establishes upon principles of humanity and of policy peculiar to the state of slavery, an exception of cases of injury to slaves.

The proposition which bases the liability on the inferiority of grade of the negligent servant, and the subordination to him of the injured servant, is, in our judgment, not founded in adequate reason. It can make no difference to the brakeman whether he is injured by the carelessness of another brakeman in some remote part of the train or of the engineer or conductor, nor can it make any difference whether a fireman is injured by the negligence of an engineer, who directs him, or the machinist who is charged with fitting the engine for the road. Protection is equally difficult to the injured party in all of the cases. There can be no reason for distinction in the nature of the employer's duty dependent upon the relation of the injured and negligent parties. The employer's obligation to his servant, in reference to fellow-servants, must be the same in all those cases. If the corporation is regarded by the law as present at what its servant does in one case it should be so regarded in every other, *qui facit per aliam, facit per se*, can be applied with no greater propriety in one case than another.

The maxim *respondet superior* applied in favor of a servant injured by a fellow-servant, in *Priestly v. Fowler*, *supra*, is shown to be unreasonable by an indisputable array of its absurd conse-

quences. We need not reproduce them. The reasoning is conclusive, without the aid of the *reductio ad absurdum*. The servant pays nothing for his transportation. He is compensated for his service according to an agreed estimate of its value, in which the element of its peril is considered. The master can do nothing more for the safety of himself or his family and property than to be careful to select competent and fit servants. To inflict a penalty upon him for not doing more for his servant is unreasonable. As long as human agencies shall be imperfect, accidents must be incident to every business requiring caution and diligence. When the master has selected competent and fit agencies, those negligences are but risks of the business, which the servant himself must take, as the master is bound to do. After the employer has furnished competent and fit employees, the prevention of negligence on the part of any one of them is certainly as much within the power of the others as in that of the employer. Why then should the employer be responsible to one for the negligence of another? Besides, there is a principle of public policy which underlies the rule. The tendency of the rule is to quicken the zeal and vigilance of servants to prevent the negligence of their fellow-servants and avoid the consequences of it. The doctrine of *respondet superior* rests upon principles of public policy which have no application here. Indeed, the rule of policy is reversed. The safety of the public, which must trust to the employees of railroads, is best consulted by impressing upon each that his own interest is inseparably blended with the safety of the passengers; and he is best stimulated to the utmost effort to prevent negligence in others, and obviate their destructive consequences by the knowledge that for injury sustained he has no redress save against the wrongdoer. He would be an unwise guardian of the public weal, who would relinquish any guaranty, however slight, of the fidelity and diligence of those agents who, beyond the sight of their employers, guide the perilous and powerful machinery of railroad transportation. It is impossible for those who represent the legal personality of a corporation to otherwise secure complete and safe repairs of defective engines than through the agency of competent and proper mechanics. If it has employed the agency of such mechanics in that duty, and no personal blame attached to it, it will not be responsible, if a defect not remedied in consequence of the negligence of such mechanic, shall have caused an injury

to another servant. Without commenting upon them, we refer to the authorities collated by Judge REDFIELD, in his work on Railways, vol. 1, § 8, pp. 520, 543. We conclude that the second charge was erroneous in deducing the liability of the defendant from the failure of its servants to effectually repair the engine and remedy a known defect, although there may have been no want of proper care and diligence on the part of the defendant.

The third charge lays down alternative hypotheses, upon each of which it asserts the defendant's liability. The charge upon the former hypothesis is, that if the plaintiff was, by reason of a defect in the engine, neither known to him, nor open to ordinary observation, exposed to unusual risks, and received the injuries complained of, and the defendant might have known of such defect, by ordinary care, then the defendant is liable. Whether this charge as an abstract proposition would be correct, if there were no other facts in the case than those which it brings to view, it is not necessary for us to decide. A charge in a suit on a promissory note, that the defendant is liable, if he executed the note, may be very correct if there is no other evidence, but it would be very incorrect if there were evidence conducing to show a payment. If the charge here were otherwise correct, it is fatally defective, because it excludes from the jury entirely the defensive matter in the case. If the engine was defective, and it was placed in the hands of competent and fit mechanics to repair, and the use of the engine without a cure of the defect, when the plaintiff was injured, was the result of the negligence of such mechanics, the defendant would not be liable. The court could not properly take from the jury the consideration of the defence set up, in reference to which there was evidence. For a like reason the latter proposition of the charge is erroneous.

Another charge given made notice of a defect in the engine to any agent of the defendant, no matter what might be the scope of his agency, notice to the defendant. This charge was obviously erroneous. The principle which should govern in reference to this subject is indicated in our remarks upon the first charge.

The court also charged, that if the engines of the kind used in this case were, owing to their make and construction, unsafe, and defendant had been running them for several years, it may be supposed to have known that they were unsafe, and if the jury believe such to be the facts, they must find for plaintiff. No steam-engine can

in strictness of language be absolutely safe, but the expression in the charge is to be considered in reference to the nature of the subject. If the defendant employed an engine from its make and construction unsafe in that sense, and knew thereof, or would have known thereof by the exercise of reasonable care and diligence, it would be responsible to one of its servants for injuries caused by such defect in make and construction, after it was known, or ought to have been known to the defendant, if the defect was not known to the plaintiff. But the charge infers a knowledge of the unsafeness growing out of the make and construction from the use of such engines for several years. Certainly such use would be a circumstance which might be argued to the jury on the question of notice, but the charge cannot be correct, unless notice is a legal presumption from such use. We do not think it is, and the charge is therefore erroneous. It might be, peradventure, that in the use of the engines the unsafeness had never been developed, and if so, the force of the fact would be lessened if not destroyed.

The charges hereinbefore noticed were given by the court upon the plaintiff's request. The court seems from the bill of exceptions to have given *mero motu* an additional charge, that if there was a defect in the engine causing it to be dangerous to use, and the company had notice thereof, it was the duty of the company to take steps to remedy such defect, and if such notice was communicated to proper agents, who were authorized to receive such notice, or whose duties were such that authority to receive such notice would be within the proper scope of their duties and agency, then such notice would be sufficient to charge the company with notice. A majority of the court deem this a fair and correct statement of the law, except in so far as it directs that notice to servants, whose duties were such that authority to receive such notice would be within the proper scope of their agency, is notice to the defendant. The question whether the authority to receive notice of a fact was within the scope of the duties of an agency is, upon ascertained facts, a question of law, and should not be referred to the jury. The principle which should govern this question is discussed in our remarks upon the second charge. See also Angell & Ames on Corporations, § 305; Story on Agency, § 140. JUDGE, J., thinks the entire charge

unobjectionable; the other judges regard it as objectionable, for the reason above stated.

Judgment reversed, and cause remanded.

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*Court of Appeals of New York.*

**WILLIAM D. ROBINSON, RESPONDENT, v. THE INTERNATIONAL LIFE ASSURANCE CO. OF LONDON, APPELLANT.**

A local board of directors, established by a foreign corporation in New York, under regulations of the statute of that state, no matter how complete its organization or how full its authority to transact business without consultation with its principal, is still a mere agency, and not a distinct corporation.

Therefore a contract, as of insurance, made by this New York board with the plaintiff, a citizen of Virginia, was the contract of the foreign corporation with plaintiff, and the government of the foreign corporation being a neutral and having recognised the government of the plaintiff as a belligerent, the contract was not suspended by the civil war in America and payment of premiums to a sub-agent of the corporation, at Richmond, was a valid payment to the corporation.

The sub-agent at Richmond was appointed by the board at New York, and before the war had no authority to collect premiums until he was furnished with "renewal receipts," issued by the New York board. After June 1861, commercial intercourse between New York and Richmond being interrupted by the war, it was claimed by plaintiff that the sub-agent at Richmond had a verbal authority to receive premiums without being furnished with renewal receipts. The jury having found for plaintiff, this court must assume that there was such authority.

Such authority to receive payment implies authority to receive it in whatever was regarded as money at the time and place of payment. Confederate notes being so regarded and being received in good faith by the agent were a valid medium of payment, as between the plaintiff and the corporation.

THIS action was brought upon a policy of life assurance issued by the defendant by its local board of directors in New York to C. W. Macmurdo, December 8th 1845. The policy was in the usual form of such instruments. The premium upon the insurance was regularly paid by the assured, who was a resident of Richmond, Virginia, to and including the month of June 1861. After that down to the time of the decease of the insured, which happened in October 1862, the amounts becoming due for premiums under the policy were paid by the assured in what is known as Confederate currency. All the payments were made after the spring of 1858 to W. S. Cowardin, who was the defendant's agent at Richmond. He was appointed as such agent by the defendant's general agents at the city of New York. And

he received what were called renewal receipts, which were delivered to the insured from time to time for the premiums paid upon his policy down to about the month of June 1861. These renewal receipts were issued to the local agent by the general agents at the city of New York, and constituted his authority to receive the premiums. After June 1861, none of these receipts were issued to the local agent. But from that time it was claimed by the plaintiff that the premiums were received by the local agent under a special authority verbally conferred, by which the renewal receipts were from that time dispensed with. After the decease of the insured, the proofs required by the policy were furnished to the defendants, and the claim for payment was assigned to the plaintiff. Upon the trial a verdict was recovered by the plaintiff, and from the judgment entered upon it the defendant appealed.

*J. W. Gerard, Jr.*, for appellant.—The sub-agency at Richmond was created by the New York board, and the London corporation knew nothing of it, and had no privity with the agent.

The company had a *double situs* in London and in New York, and the American branch was a separate and independent corporation as to business in the United States: *The Jonge Klassino*, 5 C. Rob. 302; *The Ann*, 1 Dodson 221; *The Antonio Johanna*, 1 Wheat. 159; *Elbers v. Ins. Co.*, 16 Johns. 128; Phillips on Ins. 112, § 164; *Society v. Wheeler*, 2 Gall. 105, 181; *People v. Cent. Railroad*, 33 How. Pr. 407; 1 Duer on Ins. 525. The domicile of a party is the test of his national character: 2 Lawrence's Wheaton 559-569; *McConnell v. Hector*, 1 Bos. & Pull. 113; 1 Duer on Ins. 495; 1 Kent 85-88, 10th ed.; *The Indian Chief*, 3 C. Rob. 12; *The Venus*, 8 Cranch 253; *Beebe v. Johnson*, 19 Wend. 500; *The Venice*, 2 Wall. 275; *The Frances*, 8 Cranch 363; *The Freundschaft*, 4 Wheat. 105. This doctrine prevails in the case of agency: *The Anna Catharina*, 4 C. Rob. 107; 1 Kent 87; *The San Jose*, 2 Gall. 268.

The state of war which existed made all parties resident in the two sections, *enemies* in contemplation of law: *Mrs. Alexander's Cotton*, 2 Wall. 404; *The Hiawatha Cases*, 2 Black 635; *Griswold v. Waddington*, 16 Johns. 438; Blatchford's Prize Cases, I, 556; Act of July 13th 1861, 12 U. S. Stat. 257; Proclamation



Aug. 16th 1861. The domicile of the defendant being in New York, its national character for the time was that of an American company, and all intercourse and business transactions between it and the plaintiff or the sub-agent at Richmond were illegal and void.

The state of war revoked the agency: *Carver v. Lane*, 1 E. D. Smith 165; *Lawrence's Wheaton* 557; *The Julia*, 8 Cranch 181; *The Rapid*, Id. 161; *Griswold v. Waddington*, 15 Johns. 57; 16 Id. 438; 1 Kent (10th ed.) 77; *The William Bagaley*, 5 Wall. 407; *Honger v. Abbott*, 6 Wall. 534; *Jecker v. Montgomery*, 18 How. 110; *Esposito v. Bowden*, 7 E. & B. 788.

*A fortiori* is the insurance of an enemy's goods, and particularly of his life, against public policy, and suspended during war, if not avoided by the war: 1 Duer on Ins. 417; 3 Kent 255; 1 Phillips on Ins. (3d ed.) p. 104, § 149; *Furtado v. Rogers*, 3 Bos. & Pul. 191; *Kellner v. Le Mesurier*, 4 East 396; *Gamba v. Le Mesurier*, Id. 407; *Brandon v. Curling*, Id. 410.

Even if defendant be regarded as a neutral sojourning here, it is against public policy to support this contract: 1 Duer on Ins. 623; *People v. Cent. Railroad*, 33 How. Pr. 407; *Kennett v. Chambers*, 14 How. 39.

There was no evidence of express authority to take Confederate notes, and such authority cannot be implied. They were not money, and an agent's authority to receive payment means in money strictly: *Matthews v. Hamilton*, 23 Ill. 470; *Todd v. Reid*, 4 B. & Ald. 210; *Russell v. Bagley*, Id. 395; *Dunlap's Agency* 280, 281; *Partridge v. Bank*, 58 Eng. Com. Law 396; *Grant v. Norway*, 73 Id. 457, 11 C. B. 457; *Ontario Bank v. Lightbody*, 13 Wend. 101; *Taylor v. Robinson*, 14 Cal. 396; *Story on Agency*, § 98, 10 Barn. & Cress. 760; *Barker v. Greenwood*, 2 Y. & Coll. 415; 5 Mees. & Wels. 645; *Howard v. Chapman*, 4 Car. & P. 508; 1 Starkie R. 233; *Underwood v. Nichols*, 17 C. B. 239; *Stewart v. Aberdeen*, 4 Mees. & Wels. 211, 228.

Dealing in these notes was illegal, and no authority can be implied to do an illegal act: *Clark v. Bank*, 3 Duer 241; *Wright v. Overall*, 2 Coldwell 345; *Craig v. Missouri*, 4 Peters 410; *Briscoe v. Bank of Kentucky*, 11 Id. 258.

*E. R. Robinson*, for appellee.—The power of the agent to

collect was not terminated by the war: *Griswold v. Waddington*, 15 Johns. 69; *Clark v. Morey*, 10 Id. 69; *Bell v. Chapman*, 10 Id. 183; *Buchanan v. Carey*, 19 Id. 186; *Conn. v. Penn.*, 1 Wash. C. C. 524; *Dennistoun v. Imbrie*, 3 Id. 396. The defendant is an *English* company, and the authority of its agent was not suspended by a war in which it was a neutral. The question as to the kind of money the sub-agent received is entirely between him and his principal. He was not expected to transmit the *identical notes* received to his principal.

This is a case of an executed contract, and as to such the courts have held that the payment in Confederate money will not be disturbed: *Phillips v. Hooker*, 7 Am. Law Reg. N. S. 40; *Turley v. Newell*, Phillips N. C. Eq. Rep. 301; *Green v. Sizer*, 40 Mi. 530; *Murrell v. Jones*, Id. 565; *Henley v. Franklin*, 3 Coldwell 472; *Brown v. Wylie*, 2 W. Va. 509; *Abbot v. Dermott*, 34 Ga. 227.

The opinion of the court was delivered by

DANIELS, J.—It appeared by the evidence given upon the trial of this cause that the defendant at the time of the issuing of the policy in suit, and at all times since then, was an insurance corporation, created by an Act of the English Parliament, and as that was its legal character, although it had complied with the laws of this state, providing for the manner in which foreign insurance companies may carry on and transact the business of insurance within this state, it nevertheless still remained and continued an English corporation.

The law of this state, however, conferred authority upon the defendant only to transact its business within the state of New York. It could not, and did not, authorize or empower it to appoint an agency or carry on its insurance within the state of Virginia. Whatever it did in that respect was done by virtue of the laws of comity of that state. And for that reason no particular reference will be required to the provisions of the statute under which foreign insurance companies are permitted to carry on the business of insurance in the state of New York.

It is sufficient for the purposes of this case to assume that the defendant was lawfully engaged in that business in this state, and that it had legally and properly created and maintained its agency for that purpose. And that the agency here, by a proper exer-

cise of its authority, had appointed the agent at Richmond to transact the business of the defendant and its New York agency required to be done at that place.

But even these assumptions, added to the circumstance that the defendant had organized a local board of directors at the city of New York, having authority to issue policies and adjust losses without consultation with the corporation itself, could not have the effect of changing the nature of the corporation under which all this was performed.

The board was organized and the agency was created by the act and under the authority of the corporation. The local board and the agency combined did not form or constitute a corporation, but simply the local means or agency through which the corporation carried on and transacted its business in this country. When the local board and agency issued a policy, collected a premium, adjusted a loss, or appointed a subordinate agency, it was not done for itself, but for the defendant. And the power exercised in performing either, or all of those acts, was derived from and used for the defendant.

No matter how formal or complicated such a local organization may be, it can only possess and exercise the power conferred by its foreign charter and the laws of the state upon the corporation itself. And when it makes use of such powers, it does so not as an independent body or in the nature of a subsisting corporation, but as an agency merely of the corporation under which such organization may have been effected. This is entirely apparent from the facts, that without the charter and the laws of the state relating to such corporation, the local board could be neither regularly organized or acquire the power of acting at all. And in case these laws were repealed and the charter were withdrawn, or the corporation were otherwise dissolved, the local board and agency would necessarily from that time cease to exist. It is not intended to be affirmed that the right of foreign corporations to transact business in this state is absolutely dependent upon the existence of some statutory regulation in their favor, but only that the transaction of such business is dependent upon a compliance with the provisions of those statutes while they may be maintained by the legislative authority of the state.

But it is maintained that while these laws are in existence a compliance with their requirements, whether it be by a mere

agency, properly so called, or by a local board of direction having a general charge and control over the American business of the corporation without any immediate dictation or control from the corporation itself, constitutes in fact, as well as in law, a mere agency, and nothing beyond that.

And this is insufficient to change the domiciliary nature of the corporation itself under whose power and authority, whether acquired by its foreign charter or the laws of the state relating to foreign insurance companies doing business here, this formal as well as efficient organization may have taken place. This organization was merely the medium through which the defendant carried on or transacted its American insurance business, the means through which it was done, not the body itself which did that business. Accordingly, where insurances were made, as is shown by the policy issued in this instance, it was the defendant that made the insurance and was to receive the premium for it, and pay the loss arising under it, and not the agency and board of directors existing in the city of New York. It is true, the money would pass into the hands of the local agency and under the control of the local board, when premiums were paid, and from them in the payment of losses accepted and adjusted by them; but still it would be all the time received and disbursed as the money of the defendant, in whose behalf and under whose authority the local board and agency alone had the power of acting.

As the contract of insurance made in this case was necessarily the contract of the defendant, therefore, when the war, or Southern insurrection, arose, it was not one which existed between a loyal citizen and a rebel, but of necessity between a neutral and a rebel, recognised by the defendant's government as a belligerent.

And recognition, although not binding upon or adopted in a friendly spirit to the government of the United States, was binding and controlling as authority upon the defendant. As a contract between a neutral and a rebel, or, as the defendant's government designated him, a belligerent, it was neither annulled nor suspended by the proclamation of the President or the laws of Congress, for they were not expressly or by necessary implication made applicable to cases of that character. The plaintiff was not therefore prevented from maintaining this action by anything rendering the insurance illegal which was effected in this case.

But by the terms of the policy, the right of the assured to

depend upon it as an insurance was rendered conditional upon the performance of the stipulations requiring payment of the premiums. By the written appointment of the agent at Richmond, no authority was conferred upon him to receive payment of insurance premiums. That appears to have been derived from what were called renewal receipts, which were forwarded from the agency at New York to the local agent, and by him delivered to the assured as the premiums were paid. Even this practice was discontinued after the early part of the year 1861. This discontinuance did not arise out of any disposition manifested by any act of the defendant, or the New York agency, to terminate its policies or to decline payment of its premiums, but on account of their inability to communicate readily with the local agent at Richmond. When it took place, the means of carrying on such communications had been interrupted and suspended by the insurrection. The facilities before that time supplied by the mails and express companies traversing the country had necessarily been withdrawn on account of the hostile and dangerous condition of the Southern States, and the only remaining means of communication was that which was supplied by individuals occasionally passing around or through the lines of military forces.

The agency at New York appears to have been of the most complete and general character, but still, as already shown, merely an agency. It therefore had the power to create and appoint subordinate agencies, wherever in its judgment the business of the defendant required them to be located. And this it could do either by writing or by parol. And when the appointment was made by writing and nothing limiting the action of the local agency was contained in it, the power of the local agent could afterwards without any legal impropriety be enlarged by parol. In this respect the New York agency was unrestricted by any limitations placed upon its action by the defendant, or the instruments used by itself for the creation of the subordinate local agency.

For while the written power of appointment issued to Cowardin in this case conferred certain authority upon him as agent for the defendant, not as agent for the New York agency at the city of Richmond, it contained nothing preventing additional authority being given to him, either by the New York agency or by the defendant itself. Neither was anything of that nature contained

in the renewal receipts. For by the printed instructions issued to him by the New York agency he was only prohibited from receiving premiums without a regular renewal receipt, in the absence of special authority for acting otherwise from the New York office. This agency could therefore authorize the subordinate agency to receive the premiums accruing on the defendant's policies without supplying him with renewal receipts for that purpose. And in the condition of the country, after the premium was paid in June 1861, which rendered the transmission of these renewal receipts impracticable, it was claimed on the part of the plaintiff that such authority was actually conferred.

Evidence was given on the trial tending to substantiate this claim, and on the part of the defendant to resist it. This evidence was of a conflicting nature, and as it was fairly submitted to the jury this court at the present time has no power to interfere with their conclusion upon that subject. They have found that the authority was conferred, substantially, of course, as the evidence on the part of the plaintiff tended to establish it. And if it was, it amounted to a general authority to the local agent at Richmond to receive the premiums without renewal receipts and without specific directions as to what he should receive them in. It was therefore a general authority to him to collect the premiums accruing in the defendant's favor upon the policies which it had previously issued. And this authority, under the well-settled principles of the law of agency, the agent became bound to his principal to make use of according to the ordinary course of the business he was employed in and the settled usages, if any were found to exist, relating to the subject. He could not, therefore, bind his principal or satisfy the powers of his agency by accepting property for the premiums, for that would convert the power to receive payment merely into an authority to traffic in merchandise.

But from the nature of the power to receive payment the agent necessarily derived the authority to accept whatever was generally used for the purpose of making payments in the locality where the debts were to be collected. As it has turned out, it would have been more profitable for the principal if the agent had collected the premium upon this insurance in gold coin or treasury notes of the United States. But where this authority to collect the premiums was exercised, it appears from the evidence that it

could not be either conveniently or effectively used in that manner, for gold was shown to have disappeared almost entirely from circulation, and it is a matter of history that the insurrectionary authorities discountenanced the use of United States treasury notes. When this authority was given, which the jury have found was conferred upon the agent at Richmond, there was no immediate indication that any further opportunity would be afforded for communicating with him while hostile relations existed between the government and the rebel states.

And it must therefore have been designed for his guide under circumstances at that time not fully anticipated or comprehended. The end to be obtained by the use and exercise of the authority was to be the payment of the indebtedness accruing to the defendant. And if circumstances should arise requiring the exercise of judgment and discretion in making the collection, it must have been intended that this agent should determine such matters for himself on account of the impracticability of communicating either with the defendant or the general agency located here for the procurement of special directions. Such emergencies must, from the nature of the times, have been necessarily within the expectation of the general agency, and when they arose afterwards it was the duty of the special agent to determine upon the best mode of securing the object of his principal under the circumstances. His duty as well as his authority was to collect the debts maturing in favor of the defendant. How that could best be done was necessarily left to his own prudence and judgment when the changes in the times rendered a determination upon that point indispensable to the exercise of his authority.

That such changes did arise is clearly shown by the evidence. For soon after the agent at Richmond was directed to collect the premiums without renewal receipts the actual currency of that locality was supplanted by Confederate notes of the insurrectionary government. Although not made a legal tender for the payment of debts, all other species of currency were soon driven out of circulation by them. And after that they were the financial means used for buying and selling property, and for creating and discharging debts. And while that was their character, and the premium upon gold and foreign exchange was not far above them, they were received by this agent in payment of the premiums due on this insurance.

The uncontradicted evidence given in the case is that these notes were issued soon after the passage of the act providing for them, which was on the 19th of August 1861.

And from that time they passed as of equal value with bank-notes, and during the residue of 1861 and through 1862, they were known as Confederate money and passed almost at par at Richmond. The acceptance of this currency as payment of the premiums upon the policy in suit, spurious and unlawful as the currency itself was, very materially differed from the acceptance of payment in property or in counterfeit notes or the notes of insolvent banks. For the acceptance of property was not within the spirit or scope of the agency, and the bills of insolvent banks and counterfeit notes would be wholly devoid of value and therefore no payment whatever in any just sense of that term. But these notes were not of that description, for they had a circulating value at the time the agent received them, and were used for all the ordinary purposes of currency. While in that condition he received them as payment, and from the hopeful account given by him of the prospects of the Confederacy, contained in his letter of June 1861, he undoubtedly did so in good faith, believing he was promoting his principal's interests by doing so. From the nature of the power which the jury have necessarily found was conferred upon him, the circumstances that must have been expected to attend the execution of it, the emergency he afterwards encountered, when the previous currency of his state was practically excluded from circulation by that which was issued by the Confederate authorities, the premiums upon this policy were in judgment of law paid when the defendant's agent received the amount due for them in these notes. It was the only possible mode under the circumstances existing at that time in which the premiums could be collected by him, and as it had been made his duty to obtain their payment, he was necessarily authorized to receive it in that manner.

But even if that authority were not a necessary incident of the power conferred upon him, still as he was authorized to collect the premiums, his acceptance of Confederate notes for the amount of them discharged the assured. For under the circumstances existing at the time when the authority to collect was conferred upon him, it could neither have been expected nor intended that the identical



currency received by him should be remitted to the general agency at the city of New York.

This currency, although valuable at Richmond, was worthless at New York. The only mode, therefore, in which the value it had at Richmond could be transmitted to New York was by purchasing gold or foreign exchange with it, and it appears from the evidence that it was capable of being so used. In addition to this, the course of business previously established between the New York and the Richmond agency, was for the agent at the latter place to make up his accounts and remit his collections once in each month, which was inconsistent with the obligation or expectation that the identical moneys received by him were to be remitted to the agency at New York. On the contrary, the notorious and general course of business in cases of that description was to purchase exchange with the local currency, and in that manner transmit its value to the place to which it was to be forwarded.

Not only the state of public affairs, but the customary mode shown to have been adopted in the transaction of this business also, indicate that it could not have been intended that the local currency used and received for the payment of debts at Richmond should be remitted in kind to New York. On the contrary, this was received for the convenient transaction of the business at the place where it fulfilled all the purposes and offices of a monetary currency. And accompanying its receipt was the corresponding duty to invest it in such funds or commercial paper as would enable him to transmit its local value to the general agents, whose business was carried on at a place where that local value had no existence.

Under this relation and obligation of the local agent, he became the defendant's debtor for the value of the Confederate currency at the time and place when and where it was received by him. And that obligation can only be effectually discharged by transmitting or paying that value in lawful money or its equivalent to the defendant's general agents at the city of New York.

By the acceptance of the premiums in Confederate notes the agent discharged the assured, but at the same time, under his obligations arising out of the peculiar circumstances of the case and the previous course of business between himself and the defendant's general agency, he became the defendant's debtor for the

amounts received with the duty of remitting it in such a manner to the general agency at New York as to transfer the full local value for the time being received by him to such agency.

Judgment affirmed.

### LEGAL NOTES.

**ENGLISH LAW OFFICERS—RECENT CHANGES.**—The change of ministry in England on the resignation of Mr. Disraeli, at the close of last year, was followed by the usual changes in the law officers of the Crown. Sir WILLIAM PAGE WOOD, so long known as Vice-Chancellor, and more recently as Lord Justice of the Court of Appeal in Chancery, became Lord Chancellor, with a peerage, under the title of Lord HATHERLEY; Vice-Chancellor Sir G. M. GIFFARD succeeded Sir W. P. WOOD as Lord Justice; and W. M. JAMES, Q. C., was promoted to the vacant Vice-Chancellorship.

Sir ROBERT P. COLLIER became Attorney-General, and JOHN D. COLERIDGE, Q. C., Solicitor-General.

**CONFEDERATE NOTES. LIABILITY OF CORPORATION IN THE SECEDING STATES TO STOCKHOLDER IN LOYAL STATES FOR DIVIDENDS DECLARED DURING THE WAR.**—*Keppel v. The Railroad*, in the Circuit Court of the United States for the District of Virginia, was an action by a stockholder for an account for dividends during and subsequent to 1861, the plaintiff being then a citizen of Pennsylvania. It appeared that under the Confiscation Act passed by the Confederate Congress, August 30th 1861, and proceedings in a Confederate court, some of the plaintiff's shares were sold, and the rest delivered to a receiver, and dividends were thereafter paid by the company to the purchasers and the receiver until November 1864. No dividends had been declared since then, but on the fall of the Confederate government the proceedings under the Confederate Confiscation Act had been treated as nullities, and the company admitted the title to be in plaintiff. But the company claimed that the payments of the premiums from 1861 to 1864 were valid payments, having been made under compulsion of the laws of a *de facto* government; and secondly, even if this were not allowed, the only liability was to pay on demand in such currency as had been under necessity received by the railroad, and no demand having been made until such currency (i. e. Confederate notes) had become utterly worthless, no decree could be made against the company. CHASE, C. J., considered the nature of governments *de facto*, and was of opinion that the Confederacy was not such a *de facto* government that the courts of the United States were bound to uphold transactions under its authority, when they were prejudicial to the interests of citizens of other states excluded by the rebellion, and the policy of the United States, from the care of their interests within the states in rebellion. He was therefore of opinion that the payments of premiums to any but the plaintiff were unlawful and invalid; and that as the premiums were not set apart, nor was any force actually used, or even threatened, the facts did not present a case

of exemption from liability on the principle of *vis major*. The second point of the defence he thought equally untenable, the dividends being declared in dollars, and the company, upon the declaration of each dividend, becoming the stockholders' debtor for a liquidated sum in dollars. He thought, however, that the court should recognise the fact that the earnings of the road were not in legal dollars of the United States, and that the liability of the railroad was only for the value of the currency received at a time when it ought to have been paid to the stockholder. He therefore directed an account to be computed by a master.

**PUBLIC OFFICE. RIGHT TO FEES DEPENDENT ON PERFORMANCE OF DUTIES. ASSIGNMENT OF PROFITS.**—In *Smith v. Mayor, &c., of New York*, in the Court of Appeals of New York, the plaintiff sued as assignee of one Roof, who was a Deputy Collector of Assessments in the city of New York, from July 1st 1857 to April 29th 1858, by appointment of Charles Devlin, street commissioner. During that term Roof, by direction of the street commissioner, daily offered to perform the duties of his office, but the defendants neglected and refused to permit him to do so, and in point of fact the duties were performed by another person. The compensation of a deputy collector was by law a commission on the amounts collected by him. It appears that the office of street commissioner, by whom the appointments of deputy collectors were made, was in dispute, and two sets of collectors had been appointed; the courts had decided in favor of Devlin, by whom plaintiff's assignor was appointed. Plaintiff claimed that Roof was entitled to perform the services which defendants had prevented him from doing, and that if he had, his fees would have been \$1188, and that the assignment was made after Roof had ceased to be collector, and when his title to the said compensation was complete. The court, HUNT, J., delivering the opinion, held that the appointment to office was not a contract, there could be no property in an office, and the right to fees is dependent on the performance of the duties, and the plaintiff therefore had no right of action in this form. The following cases were cited: *Conner v. Mayor*, 1 Seld. 285; *People v. Warner*, 7 Hill 81; 2 Denio 272; *Deroy v. Mayor*, 39 Barb. 169; *Canniff v. Mayor*, 4 E. D. Smith 431; *Lynch v. Mayor*, 25 Wend. 680; *Baker v. Utica*, 19 N. Y. 326.

**CIVIL RIGHTS BILL. EVIDENCE OF CHINAMEN IN A CRIMINAL PROSECUTION AGAINST A NEGRO.**—*The People v. Washington*, in the Supreme Court of California (October Term 1868), was a case arising under the statute of California providing that "no Indian or person having one half or more of Indian blood, or Mongolian or Chinese, shall be permitted to give evidence in favor of or against any white person." The defendant, a mulatto, was indicted for robbery, and on the trial the only evidence offered against him was the testimony of Chinamen, not born within the United States. The court below held the witnesses incompetent, and discharged the defendant, whereupon the case was brought to this court by writ of error. The Supreme Court affirmed the judgment, holding that since the passage of the 13th Amendment to the Constitution of the United States, and the Act of Congress of April 9th 1866, commonly called the Civil Rights Bill, the defendants stood in the same position before the law as if he were a white person. RHODES, J., thus sums up the opinion:—

"Our conclusion is, that the portion of the Civil Rights Bill now in question—and we are not called upon to consider any other—was not repugnant to the Constitution of the United States as it read prior to the adoption of the fourteenth amendment, and that its effect was to put all persons, irrespective of race or color, born within the United States, and not subject to any foreign power, excluding Indians not taxed, upon an equality before the laws of this state in respect to their personal liberty; and that the fourteenth section of the statute of this state in relation to crimes and punishments, so far as it discriminates against persons on the score of race or color, born within the United States and not subject to any foreign power, excluding Indians not taxed, has, by the force and effect of the Civil Rights Bill, become null and void."

SAWYER, C. J., and SANDERSON, J., concurred. CROCKET, J., and SPRAGUE, J., dissented, holding the Civil Rights Bill to be unconstitutional.

**TAKING PRIVATE PROPERTY. WHAT IS PUBLIC USE.**—*Horton v. Squankum & Freehold Marl Company*, in the U. S. Circuit Court, District of New Jersey (Nov. Term 1868), was a bill to enjoin the defendants from taking the plaintiff's land on the ground that the railroad which the charter authorized the company to build was a mere private road, and that private property could not be taken without the owner's consent except for public use. The Constitution of New Jersey provides that private property shall not be taken for public use without just compensation. The act of incorporation of defendants is entitled "An act to incorporate the Squankum and Freehold Marl Company." It authorizes the company to purchase, hold, and convey such marl-beds as they may deem proper, in the county of Monmouth, and to open and work the same, and to transport the marl, and to vend the same, and to build and use the railroad thereafter mentioned, and to lay and maintain drains through the adjacent lands for the benefit of their said marl beds. It further authorizes them to construct a railroad in the county of Monmouth, to run from some convenient point on the line of the Freehold and Jamesburg Agricultural Railroad at or near the village of Freehold, to the said marl beds, at or near the village of Farmingdale, with such branches as may be deemed proper, not exceeding three miles in length, and to run engines and cars on said railroad for the transportation of their said marl. And it then authorizes them to enter upon, take possession of, occupy and excavate, any lands that may be necessary for the construction of their said railroad, and, if they cannot agree with the owners thereof, that application may be made to a Judge of the Circuit Court, for the appointment of commissioners to view and examine the said lands, and to make a just and equitable appraisalment of the value of the same.

It was claimed by plaintiff that this road so authorized was merely for transportation of the company's marl, and was therefore a private road. It appeared, however, that by another Act of the same session of the Legislature, the Freehold and Jamesburg Railroad, with which the new road was to connect, were authorized to run their cars over the latter for the transportation of passengers and general freight. FIELD, D. J., delivered the opinion, holding that, "When and in what cases pri-

vate property shall be taken for public use, is a question for the legislature alone to determine. From their decision there can be no appeal. What is such a public use as will justify the taking of private property, is also a question, which the legislature must in the first instance determine. But upon this point their determination, although entitled to respectful consideration, is not final and conclusive;" citing *Tidewater Co. v. Coster*, 3 C. E. Green 518. (See abstract of this case, 7 Am. Law Reg. N. S. 760, 761.)

Upon the latter point, he was of opinion that the facts showed such a public use as would support the act. The acts relating to the connection between the proposed road and the Freehold and Jamesburg road, he thought might be construed as supplementary to each other, whether so entitled or not, and the bill and answer showed that the two companies had so accepted them, and the acts and the contracts under them brought the new road into the class of railroads which were undoubtedly a public use for which land might be taken.

Even if the act in question had stood alone, the use which it contemplated was so general and public in its nature, he doubted whether he would have felt authorized to declare the act invalid; citing as an analogous case *Scudder v. Trenton Delaware Falls Co.*, Saxton 694.

INTERNAL REVENUE. LOTTERY.—*The United States v. Olney*, in the U. S. District Court for the District of Oregon (Nov. Term 1868), was an action to recover a special tax from defendant as a lottery dealer. It appeared that Olney owning a large number of town lots in Astoria, divided them into parcels, containing in most cases one lot, but in certain others, called prize parcels, two, four, or six lots were included, or single lots of much more than average value. He then sold tickets for the uniform price of \$50, and the purchasers were to have their names written on slips of paper and the number of the various parcels also on slips of paper and both to be drawn by lot, the purchaser whose name was first drawn to take the parcel first drawn, &c.

It was claimed on the part of defendant that each purchaser got a lot worth the price of his ticket, \$50, and that they having become the owners in common of the property, took this mode of dividing it among themselves. The court, however (DEADY, J.), held it a lottery, as the element of *chance* was a principal part of the consideration offered and regarded in the purchase of tickets; citing *The Art Union Case*, 7 N. Y. 228.

INTERNAL REVENUE. CRIMINAL LAW. DISCHARGE OF JURY WITHOUT PRISONER'S CONSENT.—*The United States v. Watson*, in the U. S. District Court, Southern District of New York, was an indictment under the Act of July 13th 1866 for concealment of distilled spirits removed from the distillery in violation of the revenue laws. Defendant moved for a discharge on the ground that at a previous term a jury had been sworn under the same indictment, and, on account of the sickness of the district attorney and the absence of witnesses for the United States, a juror had been withdrawn by order of the court, and without the consent of defendant.

BLATCHFORD, J., held that the discharge of the jury under the circumstances, was not caused by necessity, and therefore was a bar to further proceedings. (BLATCHFORD, J., explained that he had ordered

the juror withdrawn under the impression that defendant consented.) See the opinion in full, in 8 Internal Revenue Record 170.

**REVENUE ACTS. IMPORTS. BOND FOR GOODS SEIZED.**—*The U. S. v. Four Cases of Silk Ribbon*, in the U. S. District Court for the Southern District of New York (May Term, 1867), and *U. S. v. 12,347 Bags of Sugar* (Nov. 1868), in the U. S. District Court, District of California, were both upon motion to instruct appraisers as to the mode of appraisement of goods and to deliver to claimants on filing bond for the proper amount. In both cases, the goods while in warehouse under the ordinary bond for duties, under the Acts of Aug. 30th 1842 and Aug. 6th 1846 (9 Stat. 53, Brightly's Dig. tit. *Imports*, § 282, &c.), had been seized for violation of the revenue acts, under the Act of May 28th 1830, § 4 (4 Stat. 410, Brightly's Dig. *Imports*, § 206), and March 3d 1863, § 2 (12 Stat. 739). The questions were whether the bond required by the Act of March 1st 1799, § 89 (1 Stat. 696), should be for the full market value of the goods or such value less the duties legally chargeable thereon, and whether the value should be estimated at the time of seizure or the time of delivery. In the New York case, BLATCHFORD, J., was of opinion:—

1. That the bond should be for the full value of the goods *to the importer* at the time of seizure.

2. That when the goods are seized in his hands after the duties are paid, their value to him is the market value, which includes the amount of duties.

3. That where the goods are seized in warehouse, their value to the importer is the market value less the duties, and for this amount the bond must be given.

In the California case, HOFFMAN, J., dissenting from the preceding decision, held that the bond must be for the full market value at the time of appraisement and delivery to claimant, without deduction for duties. (In this connection see opinion of CADWALADER, J., in *U. S. v. Segars*, 3 Phila. Rep. 517.)

**ADMIRALTY. FORFEITURE OF SEAMEN'S WAGES FOR DISOBEDIENCE OF ORDERS.**—The case of *The Bark Almatia*, in the U. S. District Court, District of Oregon (Nov. Term, 1868), was a suit *in rem* for seamen's wages. The facts were, that libellants had shipped for a round voyage from San Francisco to Portland-on-Wallamet and back. While at the dock at Portland, on a Sunday morning, the second mate called the men up at six o'clock, and set them to work about the ship. He then ordered them to loose and refurl the foresail. The weather was calm and dry and the foresail had been furled the Tuesday before, by order and direction of the first mate. It was then half-past eight o'clock, and the custom was to have breakfast on Sunday morning at eight. There was no necessity of refurling the sail at that time. To this order, the men replied that it was after eight o'clock, and they wanted their breakfasts. The officer immediately reported this answer to the master, who had the men called aft. On coming aft, the master asked the men what was the matter. They answered that they wanted their breakfast. To this the master replied—You want your breakfast, do you? The master then asked the men if they would furl the sail. They replied that it was after eight o'clock, and they wanted

their breakfasts. The master then said—You refuse duty then; mind you get nothing coming to you. The men replied—We don't refuse to do duty, but we want our breakfasts. The master then ordered the second officer to go ashore and get men to furl the sail. The officer did so, but none were obtained, and the sail was not refurled until the following Monday evening. No more notice was taken of the men. By direction of the master, the men were given their meals on Sunday and slept on board, but were not called out on Monday, and on applying for breakfast were refused. The men went on shore and asked the master what he was going to do with them, to which he replied he did not know them; they had taken charge yesterday morning, and he would have nothing more to do with them. The men asked if they could go ashore; to which the master said, "I don't tell you to go ashore;" and to a request for payment, he said, "No; get it out of the ship if you can." They then brought this suit, and the claimants defended on the ground of desertion and disobedience of orders. The court (DEADY, J.) held that there was no desertion, and decreed for libellants for the estimated time of the round trip and the price of passage home to the port of shipment, but deducted one month's wages from the libellants on account of their misconduct in not obeying the order to refurl the foresail. The order, he thought, was not an extreme one, and even though they felt that it was given at the time with the intention to annoy and punish them, yet the officer had a right to have the sails furled to please his eye and in accordance with his own notions of what was seamanlike, and they should have obeyed.

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## ABSTRACTS OF RECENT AMERICAN DECISIONS.

### SUPREME COURT OF CALIFORNIA.<sup>1</sup>

### SUPREME COURT OF MAINE.<sup>2</sup>

### COURT OF CHANCERY OF NEW JERSEY.<sup>3</sup>

### SUPREME COURT OF NEW YORK.<sup>4</sup>

### ADMIRALTY.

*Jurisdiction.*—A cause of action, to be cognisable in admiralty, whether arising out of contract, claim, service, or obligation or liability of any kind, must relate to the business of commerce and navigation: *People v. Steamer America*, 34 Cal.

*Mode of raising issue on.*—The only mode of raising issue on the jurisdiction of a state court, on the ground that the cause of action pending

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<sup>1</sup> From J. E. Hale, Esq., Reporter; to appear in 34 Cal. Rep.

<sup>2</sup> From W. W. Virgin, Esq., Reporter; to appear in 55 Me. Rep.

<sup>3</sup> From C. E. Green, Esq., Reporter; to appear in vol. 4 of his Reports.

<sup>4</sup> From Hon. O. L. Barbour, Reporter; to appear in vol. 51 of his Reports.

therein belongs to maritime jurisdiction, is by presenting in the pleadings the essential facts showing such cause to relate to the business of commerce and navigation : *Id.*

*Where the State is Plaintiff.*—Whether a state court would not hold its jurisdiction of an action brought in the name of the People and in aid of the public revenues of the state, even though the cause of action related to the business of commerce and navigation, suggested, but not decided : *Id.*

#### BANKS.

*Spurious Notes.*—The defendant having, on the 1st day of July 1863, paid out to the plaintiff a counterfeit bill, purporting to be issued by another bank, and the plaintiff having neglected to return it for redemption until the 17th day of September following : *Held*, that if the duty rested upon the plaintiff to return the bill and notify the bank of the forgery, within a reasonable time after its discovery, the question of negligence, under the circumstances, was for the jury to decide : *Burrill v. The Watertown Bank and Loan Company*, 51 Barb.

*Held*, also, that when the plaintiff was in doubt, and had no ready means of detecting the forgery, the duty of returning the bill immediately was not absolute, although its genuineness had been questioned ; and that the duty of returning forged paper, in such a case, must begin, if at all, from the time the holder has what the jury shall deem satisfactory evidence of its spuriousness : *Id.*

Where a person receiving from a bank a spurious note pays it out to a third person supposing it to be genuine, and the latter neglects for an unreasonable time, after being informed that it is counterfeit, to return it, the bank cannot avail itself of such third person's neglect to defeat the action of the one to whom it had paid out such note : *Id.*

The decision in *Flowers v. Todd*, 6 Hill 340, requiring a creditor who takes forged bank paper in payment of his debt to return or offer to return it to his debtor, before he can maintain an action upon his original demand, questioned : *Id.*

#### BILLS AND NOTES. See Stamp.

#### CORPORATION. See Libel.

*Dissolution—Comity in Courts of another State.*—The judgment of another state, decreeing a dissolution, and appointing receivers to wind up the concerns, of a corporation created by its laws, will not prevent an action commenced against such corporation here, prior to such distribution, from proceeding to judgment, unless it be shown that the corporation is utterly extinct : *Hunt v. Columbian Ins. Co.*, 55 Me.

It is not sufficient to show that, by the law and usage in the court of the state where such decree of dissolution is passed, such corporation is permanently dissolved, although it still has a qualified existence, capable of being a party to a judgment there : *Id.*

The legal authority of receivers, duly appointed in another state, is co-extensive with the jurisdiction of the court by which they were appointed : *Id.*

Comity does not require the S. J. Court of this state to permit receivers appointed by the court of another state to exercise privileges



detrimental to our own citizens, while pursuing appropriate legal remedies here: *Id.*

#### CRIMINAL LAW.

*Party as Witness.*—The Act of 1864, ch. 280, allowing a person charged with crime to be called as a witness at the trial, "at his own request, but not otherwise," is constitutional: *State v. Bartlett*, 55 Me.

The fact that he does not testify is a proper one for the consideration of the jury in determining the guilt or innocence of the accused: *Id.*

*Statement of Prisoner, as evidence against him, when not voluntarily made.*—Where a prisoner, accused of robbery of certain money, promised to point out the place where the money was buried, and afterwards pointed out a place at which, it was proved by other witnesses, the stolen money was found: *Held*, that such statement, when taken in connection with said fact and proof, was admissible in evidence against him, although not voluntarily made: *People v. Hoy Yen*, 34 Cal.

But when, in such case, in connection with such promise, the prisoner further stated, "I buried the money there:" *held*, that this was inadmissible as evidence against him: *Id.*

#### DAMAGES.

*Funeral Expenses.*—In an action under the statute for causing by wrongful act the death of a person, funeral expenses are not recoverable, except as special damages, if recoverable at all, and must be specially pleaded: *Gay v. Winter*, 34 Cal.

#### DEED.

*Alteration and Re-delivery.*—A deed of warranty duly executed and delivered, but unrecorded, of one undivided half of certain lands therein described, may, by consent of the parties thereto, be altered by erasing the words "one undivided half of;" and a re-delivery of such altered deed will render it effectual to convey the whole of the premises without a re-acknowledgment: *Bassett v. Bassett*, 55 Me.

*Reading to an illiterate Grantor.*—The omission to read an instrument to an illiterate marksman renders the certificate of acknowledgment of no value as proof where the dispute is whether the paper so certified is the paper that was actually read, or whether it was correctly read to the party executing it: *Suffern v. Butler*, 4 C. E. Green.

Ordinarily the burden of proof is upon a party impeaching his own deed, to show that it is not his deed after it is formally proved. But where it appears beyond doubt that the grantors are illiterate marksmen, and that the deed was read to them by the grantee himself, and by him only, the burden of proof is shifted: *Id.*

EASEMENT. See *Water Right*.

#### ELECTIONS.

*Returns not to be rejected for Irregularity not resulting in Injury.*—Election returns should not be rejected for any irregularity in the appointment of the officers of election, where it does not appear that any injurious results accrued therefrom, either by the reception of illegal

votes or the rejection of legal votes, or that either of the candidates lost or gained votes thereby: *Keller v. Chapman*, 34 Cal.

*Counting Votes not cast.*—It was manifest error for the county court, when trying a contested election case, to allow to one of the contestants votes not in fact received, although offered to and rejected by the election board; and this, whether the proffered votes were properly or improperly rejected: *Webster v. Byrnes*, 34 Cal.

#### EXECUTOR.

*Suit by.*—In an action of assumpsit, brought by one who sues as administrator, the general issue admits the capacity of the plaintiff. The question of the plaintiff's capacity can be raised only by plea in abatement: *Brown, Adm., v. Nourse*, 55 Me.

In this state, the rule does not require that the writ should set out where, or by what authority, the administration was granted: *Id.*

*Power of Court over.*—When an executor is also trustee, and the matters in his charge as trustee can be separated from those confided to him as executor, this court may remove or supersede him as trustee, but in such case he will be left to execute and perform any duty devolving upon him as executor: *Leddel's Executor v. Starr and Wife and Others*, 4 C. E. Green.

In proper cases this court will enjoin an executor from proceeding further in the execution of his duties as executor, and will appoint a receiver, and direct him to pay over the estate in his hands to the receiver to be administered under the direction of the court, but in such case he is not removed or superseded as executor: *Id.*

Generally, a receiver will only be appointed on bill filed for that purpose, and rarely before answer, except under provisions by particular statutes. He will be appointed on petition only in the cases of infants whose position as wards of the court gives them the right to apply by petition, or in cases similarly situated: *Id.*

A receiver will not be appointed as against a complainant upon the application of a defendant: *Id.*

#### EXPRESS COMPANIES. See Stamp.

*Liability as Common Carriers.*—An express company is to be regarded as a common carrier, and its responsibility for the safe delivery of property entrusted to it is the same as that of a carrier. It cannot by a notice, or by an exception in a receipt, which is not shown to have come to the knowledge of the shipper or holder, exempt itself from liability in whole or in part, if goods are lost through its negligence: *Belger v. Dinmore, Pres't, &c.*, 51 Barb.

Nor will proof, even, that such notice was brought to the knowledge of the owner, be sufficient to relieve the carrier's liability; but an express contract must be proven: *Id.*

*Receipt limiting Liability.*—An express company, sued for the value of a trunk and its contents, which it had undertaken to transport, gave in evidence a receipt given at the time of receiving such trunk, in which the liability of the company was limited to the sum of \$50. There was no evidence that knowledge of the contents of the receipt ever came to

or was brought home to the plaintiff. *Held*, that a refusal by the court to submit to the jury the question whether there was any evidence of a contract between the parties, and a ruling that the receipt was a binding contract between the parties, and limited the defendant's liability to \$50 and interest, for which sum, with interest, a verdict was directed, were erroneous: *Id.*

#### FRAUD.

*Concealment of Facts by Purchaser of Land.*—If a purchaser of land represent to the vendor that a certain mortgage is an encumbrance on the land, when it is known to him but not to the vendor that the mortgage was not as to him an encumbrance, and pays on that account so much less for the land, this is a fraud on the vendor, and such purchaser will be compelled to pay to the vendor that amount with interest: *Winans v. Winans*, 4 C. E. Green.

Facts set up in an answer as a justification of a misrepresentation admitted to be untrue must be proved by the defendant; the burden of proof is on him: *Id.*

#### HUSBAND AND WIFE.

*What is Conversion of Wife's Property by Husband.*—The erection of buildings by the husband on the leasehold lands of his wife, and collecting the rents, is not such disposition of them as will take away the wife's right of survivorship, and enable the husband to dispose of the leasehold estate by will: *Riley's Administrator v. Riley*, 4 C. E. Green.

An actual disposition by sale, lease or mortgage, or contract for such object, is necessary to take away the wife's right of survivorship in a leasehold estate. A mortgage or a sale of part, or a lease of part, or for a less term, only bars the wife *pro tanto*: her right of survivorship remains in the equity of redemption, and the residue of the premises or term: *Id.*

#### LIBEL.

*Liability of Corporation for Acts of its Directors.*—The directors of a corporation are its chosen representatives, and constitute the corporation, to all purposes of dealing with others. What they do within the scope of the objects and purposes of the corporation, the corporation does. If they do an injury to another, though it necessarily involves in its commission a malicious intent, the corporation must be deemed, by imputation, to be guilty of the wrong, and answerable for it, as an individual would be in such case: *Maynard v. Firemen's Fund Insurance Company*, 34 Cal.

A corporation is liable for acts done by its agents *in delicto* as well as *in contractu*, in the course of its business and their employment; and the corporation is responsible therefor, as an individual is responsible under similar circumstances: *Id.*

A corporation aggregate has the capacity to compose and publish a libel, and by reason thereof, when done, becomes liable to an action for damages by the person of and concerning whom the words are composed and published: *Id.*

LICENSE. See *Water Right*.

## LIMITATIONS, STATUTE OF.

*Suit in one State on Note barred in another.*—The Statute of Limitations is no bar to an action in this state, upon a promissory note made in another state, when the defendant has not resided here since the note was given: *Brown v. Nourse*, 55 Me.

## MALICIOUS PROSECUTION.

*Estoppel.*—A person, arrested on a special writ, subsequently and for the purpose of procuring his discharge, paying under protest a portion of the sum claimed in the writ, is not thereby estopped from showing, in the trial of an action for malicious prosecution, the want of probable cause in the original suit: *Morton v. Young*, 55 Me.

MORTGAGE. See *Vessel*.

*Right of Tenant for Years to redeem.*—A tenant for years who offers to pay off a mortgage-debt has the right to redeem. Like a second mortgagee or judgment-creditor having a right to redeem, he has not perhaps strictly the right to demand a written assignment of the bond and mortgage, but he stands by redemption in the place of the mortgagee, and will be subrogated to his rights against the mortgagor and the reversioner. He has the right to have the bond and mortgage delivered to him uncanceled, which, in such a case, is in equity, and may be at law, a complete assignment: *Hamilton v. Dobbs*, 4 C. E. Green.

## PARTNERSHIP.

*Account.*—A partner bound to account, must give a clear, distinct, and intelligible statement of the results of the business, referring also to particular books, and to the page if necessary, so that a party entitled thereto may inquire into and investigate its correctness. A reference to the books of the concern generally, and to former accounts, is not sufficient: *Gordon's Adm. v. Hammell*, 4 C. E. Green.

## RAILROAD COMPANY.

*Tender of Fare.*—In actions for a breach of duty by a railroad company in not conveying a passenger, it is not necessary for plaintiff to allege in complaint a strict legal tender of his fare: *Tarbell v. Central Pacific Railroad Co.*, 34 Cal.

It is sufficient to allege that plaintiff was ready and willing and offered to pay such sum of money as the defendant was legally entitled to charge. The transportation and payment of the fare are contemporaneous acts: *Id.*

If the passenger is ready and willing and offers to pay the legal fare when demanded by the conductor of the train, the railroad company is bound to carry him, provided there is room in the cars and the passenger is a fit person to be admitted: *Id.*

*Rule of Damages for Injuries to Land by diversion of Water.*—In an action to recover damages for injuries done to the plaintiff's premises by the diversion of a stream from its channel by the defendant, in constructing a culvert, the legal rule of damages has no reference to the cost of removing a bar of gravel carried there by a flood. The measure of damages, in that class of cases, is the depreciation in the value of the plaintiff's premises occasioned by the injury resulting from the

defendant's acts: *Easterbrook v. The Erie Railroad Company*, 51 Barb.

In a case where the deposit is comparatively extensive, and the cost of removing it would probably equal if not greatly exceed the value of the soil covered by it, the rule contemplates that the material deposited by the flood is to remain upon the land; and one of the items of damage is the depreciation in the value of the land in consequence of its remaining. The owner of the land is therefore under no obligation to remove the gravel so deposited by reason of his having received compensation for his damages from the wrongdoer; nor does he incur any peril, in a legal sense, by suffering it to remain: *Id.*

Hence his neglect to remove such gravel bar will not preclude an action by him for damages done by a subsequent flood, in consequence of the improper and unskilful location and construction of the culvert by the defendants; although such gravel bar may have had some effect in deflecting the course of the flood. The case will be the same in that respect as if the flood had been thus diverted by the natural formation of the surface of the plaintiff's land, or as if the bar had been deposited there before the culvert was made: *Id.*

#### RECORDS.

*Of Public Office of another State.*—The records in public offices of other states of matters which are not judicial proceedings, may be proved by a sworn copy or by certificate, according to the Act of Congress. But when received, their effect is the same as in the state of which they were records. That effect must be shown by proving the law of such state upon the subject; it cannot be presumed: *Condit v. Blackwell*, 4 C. E. Green.

#### STAMPS.

*On Express Company's Receipt.*—A receipt, such as is usually given by express companies for goods delivered to them for transportation, is not subject to any stamp duty, but is covered by the exception in the Act of Congress of 1865: *Belger v. Dinsmore, Pres't, &c.*, 51 Barb.

*Stamp on Note.*—An internal revenue stamp is no part of the note, and a demurrer will not lie to a complaint which fails to aver that the note was duly stamped: *Hallock v. Jaudin*, 34 Cal.

In order to defeat a recovery on an unstamped note, it must appear that the stamp has been fraudulently omitted: *Id.*

STREAM. See *Railroad Company. Water Right.*

#### SURETY.

*Signing of Note does not make Joint Liability.*—Two or more persons severally signing a promissory note as sureties do not thereby incur a joint liability: *Bunker v. Tufts*, 55 Me.

Such sureties cannot maintain a joint action on the case against a person who subsequently "aids or assists" their principal "in a fraudulent transfer or concealment of his property, to secure it from creditors," although, after such conveyance, they became joint creditors by the joint payment of said note: *Id.*

When several sureties pay the debt of their principal, and there is no

evidence of a partnership or joint interest, or of payment from a joint fund, the presumption of law is that each paid his proportion of the debt: *Id.*

TENANT FOR LIFE. See *Trust.*

#### TOW-BOATS.

*Owners not Carriers.*—The owners of a steamboat employed in the business of towing boats for hire are not common carriers, and hence not insurers. But they are liable if guilty of gross carelessness, if not for a failure to exercise ordinary care in the management of the steamer and the boats towed: *Wooden v. Austin*, 51 Barb.

*Liability of Owners.*—A provision in a contract for towing that the boat shall be towed "at the risk of the master and owner" of such boat, refers to the perils of navigation simply, and cannot properly be construed to excuse the negligence of the proprietors of the towing vessel, or those in charge thereof: *Id.*

Parties undertaking to tow a boat from one place to another are bound to do so, unless prevented by causes to which at least gross negligence on their part does not contribute: *Id.*

The defendants agreed to tow the plaintiff's boat from Albany to New York. After proceeding three or four miles the defendant's hawser broke, and set the plaintiff's boat, with others, adrift, which floated down the river some 14 miles, without any attempt to regain it. There was no explanation offered in respect to the strength of the hawser, or the immediate cause of its breaking, or in regard to the management of the steamer, or why an effort was not made to again take the plaintiff's boat in tow; although there was evidence to the effect that there was no difficulty in the steamer taking the entire tow through to New York. In an action against the defendants for damages occasioned by their negligence: *Held*, that the plaintiff was improperly nonsuited: *Id.*

TROVER. See *Vessel.*

*What is Conversion.*—A person is guilty of a conversion who sells the property of another, without authority from the owner, notwithstanding he acts as the agent or servant of one claiming to be the owner, and is ignorant of his principal's want of title: *Kimball, Exec'x.*, v. *Billings*, 55 Me.

And it is no defence to an action of trover that the property sold was government bonds payable to bearer, provided the principal was not the *bonâ fide* purchaser.

#### TRUST.

*Capital and Income of Stock Dividends.*—Where trust-funds, of which the income, interest, or profits are given to one person for life, and the principal bequeathed over upon the death of the life tenant, are invested either by the trustee or at the death of the testator in stock or shares of an incorporated company, the value of which consists in part of an accumulated surplus or undivided earnings laid up by the company, such additional value is part of the capital. This, as well as the par value of the shares, must be kept by the trustee intact for the benefit of the remainder-man; but the earnings on such capital, as well as upon the par value of the shares, belong to the life tenant: *Van Doren v. Van Doren's Trustee*, 4 C. E. Green.

When an extra dividend is declared out of the earnings or profits of such company, such extra dividend belongs to the life tenant, unless part of it was earnings carried to account of accumulated profits or surplus earnings at the death of the testator or at the time of the investment, if made since his death, in which case so much must be considered as part of the capital: *Id.*

#### VENDOR AND PURCHASER.

*Forfeiture.*—When the time for payment of the purchase-money has been extended with the assent of the vendor, and no certain time fixed when payment will be required, the vendor cannot afterwards forfeit the contract by requiring immediate payment; but the vendee is entitled to a reasonable time, after notice, to make his payment: *Cythe v. La Fontain*, 51 Barb.

It seems that the vendor may deprive himself of the right to exact a forfeiture, by afterwards refusing to accept payment upon another and untenable ground: *Id.*

*Rescinding Contract.*—On a sale of a quantity of wood, the purchaser, after he had drawn away a portion, discovered that the quality of a part of the wood was different from what the contract called for: *Held*, that he could not rescind the contract of sale, except by restoring, or offering to restore, what he had received under it: *Woodruff v. Peterson*, 51 Barb.

*Recoupment by Purchaser.*—On an executory contract of sale, the vendee, if he keeps the article, may, it seems, recoup his damages, in case of fraud, but not for breach of contract: *Id.*

*Fraudulent Representation.*—An unconditional delivery of goods without payment, at a cash sale, does not pass the title, and bind the sale as to a purchaser upon false and fraudulent misrepresentations: *Hicks & Hathaway v. Campbell and Others*, 4 C. E. Green.

#### VESSEL.

*Registration and Mortgage of.*—By virtue of the Constitution of the United States, Congress has the exclusive power to provide where the evidences of title of registered and enrolled vessels, in certain cases, shall be recorded: *Wood v. Stockwell*, 55 Me.

The state legislature has no authority, directly or indirectly, to add to or dispense with the requirements of section 1 of the Act of Congress of July 29th 1850, entitled an "Act to provide for recording the conveyances of vessels:" *Id.*

R. S. c. 91, § 1, providing for the registration of chattel mortgages, does not apply to property in vessels which are duly registered or enrolled according to the laws of the United States: *Id.*

The plaintiff, as mortgagee of one-eighth of a vessel, demanded it of the assignee of the mortgagor, who refused to comply, denying title in the plaintiff, and claiming title in himself. The defendant, both before and after the demand, received one-eighth of the net earnings and had paid one-eighth of the repairs. In trover: *Held*,

1. That the foregoing facts constitute a conversion.

2. That the amount paid for repairs should not be deducted in mitigation of damages: *Id.*

## WASTE.

*What constitutes.*—Although the common-law doctrine of waste is not, in its strictness, applicable to the condition of things in this country, yet such a cutting of trees or timber, by a tenant, as will work a permanent injury to the freehold or inheritance, in the absence of any specific leave or license to cut such trees or timber, is waste, for which an action will lie, in equity, for the prevention of such injury, by injunction, before it is committed, or at law, for the recovery of damages, by the remainder-man, after the injury is done: *McCay et al. v. Wait*, 51 Barb.

Whether the cutting of trees and timber, in any case, is such an injury to the inheritance, or not, is necessarily a question of fact for the jury, or the court, when the action is tried by the court without a jury: *Id.*

## WATER RIGHT.

*Can only pass by Deed—License.*—A right to divert the water of a river (owned on either side and to the middle, and subject to no public right), is an incorporeal hereditament, and can pass only by instrument under seal: *Veghte v. The Raritan Water-Power Co.*, 4 C. E. Green.

The charter of a water-power company authorizing the company to divert the water of a river, upon the written consent of the landowners, does not dispense with the necessity of a deed or conveyance of the right in the form required by law. It confers the power, but not the title. Such consent is only a license: *Id.*

In general, a license at law will create no estate in the lands of the licensor, but will justify or excuse any act done under it. It is revocable even when given for a consideration, and after it has been executed. But, in such cases, where the revocation would be a fraud, courts of equity give a remedy either by restraining the revocation, or by construing the license as an agreement to give the right, and compelling specific performance by deed, as of a contract in part executed: *Id.*

But a license to a person to do or erect something on his own land by which a right or easement of the licensor may be affected, if once executed, cannot be revoked: *Id.*

The effect of a license to do an act on the land of the licensee can only extinguish such easement as may be abandoned, that is, easements or rights acquired by grant or prescription, and in no case affects easements or incorporeal hereditaments which are by law annexed to the land of the licensor, such as the right to running water passing over his land in a natural stream or watercourse: *Id.*

An easement will not be extinguished by mere non-user for twenty years, unaccompanied by acts showing an intention of abandonment. In such cases, adverse possession, as well as non-user, is necessary to effect the extinguishment: *Id.*

*Damage from Ditches.*—Where K. owned a ditch which passed over the land of R., he was bound to so use it as not to injure R.'s land, and this irrespective of the question as to which had the older right or title; and if, through any fault or neglect of K., in not properly managing and keeping his ditch in repair, the water overflowed or broke through the banks, and destroyed or damaged the land of R., by



either washing away the soil or covering it with sand, K. was liable for such injury: *Richardson v. Kier*, 34 Cal.

*Ravine adopted as part of Ditch.*—A ditch-owner may only adopt a ravine, which is also a natural watercourse, as part of his line of ditch to the extent of the capacity of his ditch to convey water. If an injury result from an overflow of the water of such ravine, not occasioned by its use as part of such ditch, the ditch-owner will not be responsible therefor: *Id.*

Where K. discharged water from his ditch above R.'s land in such place that it naturally would, and did, flow over and upon and injure R.'s land, K. is responsible for such injury; nor can K. shield himself from this responsibility because he may have sold this water at such place to miners, by whom it was used for mining purposes before, in the course of its flow, it reached R.'s land and occasioned such injury: *Id.*

In such case, the fact that the miners so using the water contributed to and enhanced the injury sustained, and are joint tortfeasors with K., will not relieve K. from his liability or affect its measure: *Id.*

#### LIST OF NEW LAW BOOKS.

**BREWSTER.** A Digest of Cases decided by the Supreme Court of Pennsylvania, as reported from 3 Wright to 5 P. F. Smith, inclusive; with Table of Titles and Table of Cases. By F. CARROLL BREWSTER. 8vo. pp. xli., 354. Philadelphia: John Campbell. 1869. Shp. \$4.50.

**MARYLAND.** Supplement to the Maryland Code, containing the Acts passed in 1868, arranged in Sections to correspond with the Code. By LEWIS MAYER. 8vo. pp. 426. Baltimore: J. Murphy & Co. 1868. Shp. \$4.

**MARYLAND.** Reports of Cases in the Court of Appeals of Maryland. By J. S. STOCKETT. Vol. 27. 8vo. pp. 784. Baltimore: J. Murphy & Co. 1869. Shp. \$5.

**THE NATION.** A Journal of Politics and Literature. Published weekly, at \$5 per annum. Box 6732, New York.

**NEW YORK.** Reports of Practice Cases in the Courts of New York. By B. V. ABBOTT and A. ABBOTT. New Series, Vol. 4. New York: Dossy & Co. 1869.

**NIXON.** A Digest of the Laws of New Jersey. By L. Q. C. ELMER. Fourth Edition, with all the Laws of General Application now in force from 1709 to 1868. By J. T. NIXON. 8vo. pp. xxxii., 1152. Newark: M. R. Dennis & Co. Shp. \$7.50.

**PARKER.** Reports of Criminal Cases in the Courts of New York. By A. J. PARKER, LL.D. Vol. 6. 8vo. pp. 727. Albany: W. Gould. \$7.50.

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LEGAL TENDER NOTES BEFORE THE SUPREME COURT.

THE recent discussion of the question of the validity of the Act of Congress creating the legal tender notes, before the Supreme Court of the United States, and the manner in which the question is viewed by the public in general, are certainly calculated to create, or perhaps we might more properly say to confirm, distrust in general public opinion, as an index or guide to truth. When the law was first passed it was regarded as evidence of disloyalty for any one to impugn the validity of that act. The class of men, considerably numerous, indeed, and highly respectable in point of character, learning, and ability, who did openly denounce the act as an unworthy debasement, or attempted debasement of the public money of the nation, was encountered and assailed from every portion of the country as disloyal and unpatriotic; and certain epithets which were regarded as derogatory, and specially efficient in producing opprobrium and discredit, were freely heaped upon them, without measure or stint. At the present time, however, all this seems to be changed. Every one seems to feel at liberty to discuss the question of the validity of the law with the utmost freedom. But what is most remarkable in this discussion is, that while the best lawyers and the most cautious and conservative men in the country now approach the question with obvious diffidence and distrust in their own power to comprehend all its bearings, or to give it a satisfactory determination, the poli-

ticians, and letter writers, and others of the class who spend much of their time, as the Athenians did in the days of St. Paul, in hearing or telling some new thing, and who are supposed to reflect pretty accurately the general, superficial political public sentiment of the country, for the day, or the hour, exhibit a most amazing amount of flippancy and readiness to relieve all the doubts and difficulties of their hearers and readers by their own single and simple *ipse dixit*. And so common is it, in and about the Capitol, and in the leading city journals, at the great commercial centres of the nation, to hear and read the unqualified opinion and declaration, that the court will declare the law invalid with all but unanimity, that one is led to seek the explanation of this surprising garrulity against the law in the very quarters where but lately was found such inquisitorial intolerance of all such opinion, in some source of light and intelligence quite beyond any developments disclosed in the argument. It almost seems as if the authors of the act would now be glad to escape responsibility by invoking the aid of the court in declaring it void. But the court will do no such thing, for any such reason.

We had the agreeable opportunity of listening to the arguments before the court through most of the sessions for three successive days, and it was certainly such an intellectual banquet as is very rarely exhibited in any forensic encounter. We do not care to venture upon any specific estimate of the particular excellencies of the successive advocates, where all were confessedly so able and so eloquent. We had listened to all the advocates, on other occasions, with the exception of Mr. Potter, of New York. The opening argument in favour of the validity of the law was made by Judge Curtis, in his clearest, purest, happiest vein, as nearly perfect, both in matter and manner, as it is possible for us to conceive a law argument to be. Mr. Townsend, of New York, and Mr. Potter occupied parts of two days in reply, placing the main force of the argument on the ground of the impolicy and injustice of the law, and upon the early history of the Government and the Constitution, as showing both the improbability that the Constitution was intended to receive any such construction, and, as far as practicable, the fact that such was not the purpose of its framers, or of those who adopted it. These gentlemen commanded a good degree of attention, and made themselves, on the whole, very interesting.

The Attorney-General, Mr. Evarts, closed the argument with his usual copiousness of learning and fulness of illustration.

The only possible exception one can make to his manner of arguing causes in banc is, that he is, if possible, too deliberate, causing the attention of the court, after listening a considerable time, to rather flag, and lose something of that keen edge which it is always desirable to maintain throughout, if possible. A certain degree of deliberation and quiet self-possession adds very greatly to the force of a mere dry legal argument before a bench of judges, especially where, as in the present case, they are considerably numerous. And we know that Daniel Webster sometimes adopted this peculiar mode of argument with great effect in addressing courts; and juries possibly sometimes, but not by any means as a general rule. And he could do some things, sometimes, which it would be scarcely safe for any other man to attempt. As his favorite brother, Ezekiel, once said of him, "Brother Daniel could puzzle" [or even overwhelm] "a great many men that knew more than he did." No American, probably, and no Englishman, perhaps, ever possessed the power of manner which Daniel Webster seemed unconsciously to fall, or be driven, into. What seemed in him the inspiration of the moment, or the result of the secret and hidden springs of the cause, might not always appear so in others, at least on occasions of no special interest.

But bating this single and unimportant drawback in the Attorney-General's mode of speaking (which we are specially desirous of seeing improved to the extent of the Latin maxim, *festina lente*, on account of our great admiration of the man), it must be admitted that he presents one of the best models of forensic eloquence at present to be found in this or perhaps any other country. Mr. Evarts' dry law arguments, while abounding in all the learning and logic which it is desirable to find there, abound also with the richest and choicest illustrations which it is possible to conceive, or which the purest and most chastened rhetorician could desire. And this alone makes it necessary to occupy more time than would otherwise be required, and thus imposes a somewhat greater strain upon the powers of the orator. The argument of Judge Curtis fell far within the limits of one hour, and it commanded the most undivided and unflagging attention to the last moment; and as a presentation of the legal argument, and

it aspired to nothing else, it was certainly of a most uncommon and unrivalled character.

But the general style of argument in this court is losing much of that conversational air which gave it such a charm thirty years ago, and which still prevails, to a great extent, in Westminster Hall. The present style of forensic debate there is more like that of Pinkney, and Emmett, and Lowndes, than the school that followed these great masters of forensic eloquence, which was far less ornate and discursive. Each has its advantages and its followers. But the present style of forensic debate in America is rather French than English, and is based, perhaps, somewhat upon Rufus Choate's theory, that if you would move the court and jury, you must first electrify the bystanders, and the audience generally.

But we are very far from any assurance that the ablest, and purest, and most learned courts, and the judges of this court possess all these qualities in an eminent degree, are sure to be most effectually convinced, upon a great constitutional question, by merely dry legal views. There was something so stirring in the many eloquent illustrations and appeals of the Attorney-General, that we could not but feel that very likely they would effect a lodgment in the sternest legal minds, where no force of pure cold logic could reach. We believe the ablest, and most experienced, and learned judges are more frequently induced to reconsider a over-established opinion, upon the force of a pertinent illustration, or an argument *ab inconvenienti*, or the *reductio ad absurdum*, than by any amount of mere deductive reasoning. But it is fair to say that, taking the pure legal view of Mr. Curtis, and the mixed legal and practical view of the Attorney-General, there was nothing more to be desired on that side.

The argument upon the other side was considerably weakened in its force, upon the general question of the validity of the legal tender clause in the act, by the fact that the validity of gold contracts, under the law, was also involved in the cases, and this of course caused considerable diversion and consequent loss of force upon the main issue. One of the speakers, too,—whose argument was in the main very able and happy,—we are bound to say fell into the common fault of diffuse and ready speakers generally, of loading his argument with an infinite number of illustrations, drawn from every source of supposed analogy, many of which were far more doubtful than the main proposition, thus dividing

attention of the court and dissipating the intrinsic force of his argument. Mr. Townsend, whose case was that of a gold contract, in terms, made a very close and learned argument, which we should be surprised to have overruled by the court, even if they maintain the entire validity of the act. Having spoken so much at length upon the argument in these cases, we shall be able to say less in regard to the questions involved than we had desired, or intended. But we shall present a brief *resumé* of the points, not much relied upon in the argument before the court, but which appear to us worthy of consideration.

The argument against the validity of the act seems to be placed largely upon the injustice and severity of its operation upon past transactions. This argument, as it seems to us, is completely answered by the consideration that the validity of an act of legislation does not, in any sense, depend upon its innate wisdom or justice. Where the power of legislation exists, it is equally operative, whether its exercise be wise or unwise, just or unjust. And the same injustice is confessedly within the power of Congress, in regard to the currency, by debasement of the metallic coinage as by issuing bills of credit. The Acts of Congress have more than once lowered the standard of the established coinage, and thus lessened the amount of standard gold or silver which subsisting contracts would require for their performance. And if this can be done in a small degree, it can equally be done to any extent which the government shall deem expedient, and thus effect the same depreciation complained of by making legal tender notes, so that this argument is thus effectually answered. It is a power which the National Legislature always possesses, and may exercise at will.

Again, much stress is often placed upon the historical fact that it was proposed in the convention framing the Constitution to give the express power to the National Government to issue bills of credit, and that this was not accepted, or, as it is called, was rejected. Now this is not by any means the same thing as if the power to make the Constitution had resided in the convention. It is not the same as if the proposition to emit bills of credit had been submitted to the people and rejected. The most that can fairly be argued from this fact is, that the convention could not agree to submit to the people any express provision to enable the National Government to issue bills of credit. If this

had been done, it must have been accepted in that form, or the whole Constitution would have been rejected. This might have been the prevailing reason which induced the convention not to embrace that specific provision in the frame of government submitted. It merely shows then, that, for some reason, the convention could not agree to submit that express provision.

But it by no means leaves the Constitution, as adopted, subject to any implications against the provision being virtually implied in what was submitted and adopted, because this express provision was not embraced in it. The people had no knowledge of the discussions of the convention, or of the propositions discussed by it and not embodied in the Constitution, but acted upon the document as presented to them; and it is therefore fairly entitled to receive its construction upon what appears in it, without reference to any discussions or propositions before the convention, and which did not result in any affirmative action. It is much like the case of a contract, since the passing of the Legal Tender Act, in which the parties, in their preliminary action, had attempted to define the currency, either gold or greenback, in which it should be payable, but could not agree, and therefore left it to legal implication. There would surely be no ground of argument, in such a case, that the parties had virtually fixed the currency in which payment should be made, or that because the parties failed to agree either upon gold or currency, both must be excluded. No principle of legal construction is more familiar, than that none of the preliminary negotiations can be received or considered in fixing the construction of the contract. And the same is true in regard to any written instrument, whether a contract, a testament, or a constitution. Each must speak by its own words, construed with reference to its subject-matter and the purpose of its creation.

If then the United States Constitution, like ordinary written instruments, is entitled to be construed by its language, with reference to those allowable aids to which resort is always made in such cases, we shall find less embarrassment in reaching a satisfactory conclusion than if we were compelled to regard the views of the framers or of the people, then or now, or any other outside influences, in the matter. No doubt tradition, or contemporary history, may, in many instances, afford great aid in learning the import of terms, or the general purpose and intent of an act or instrument, or contract.

In that view the known and declared facts recited in the preamble of the Constitution, wherein the transaction is declared to be the work or act of the people of the whole United States, is a very significant intimation that the purpose was to create a national sovereignty, and not a mere confederation among the states. The other portions of the preamble look in the same direction. "To form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity," are all objects not to be expected from any thing less than the establishment of a national and consolidated sovereignty.

Then the general frame of the instrument shows that the new government was expected to embrace all the important, certainly all the indispensable, powers and functions of national sovereignty, and that it was to be automatic, possessing all the functions and resources of sovereign states, viz., executive, legislative, and judicial.

As showing too the paramount and supreme power of the newly-created national government, the national judiciary is given the supreme function of defining and measuring all the national powers, and at the same time of defining and measuring the powers reserved to the several states under the National Constitution, by allowing writs of error to the highest judicial tribunal in the state from the Supreme Court of the nation in all matters affecting any power or function derived from or under any Act of Congress or the National Constitution, or where it was claimed that any conflict had arisen in regard to the validity of any state law by reason of its conflict with the powers and functions of the national government under its Constitution, and the decisions of the state court had been adverse to the national claim of authority.

Under such a distribution of the powers of sovereignty, it would be natural to find that the power of making money and declaring the value of the same should be reposed in the national government, as a clearly national function. This we do find to be the fact, either fully or subject to limitations. There can be no doubt that before creating the national sovereignty the general and unlimited power of making money, in all modes known to the law of free states, did exist in the fullest possible form in each of the



states. And although the history of free states shows, that for commercial purposes a circulating medium of the precious metals is regarded as the most desirable, and the only desirable one, yet it is certain this has never been regarded as the exclusive currency of even commercial states. Almost all the European states have, in emergencies of great pressure, during war or in other great commercial crises, resorted to the issue of national bills of credit, by declaring them part of the money or circulating medium of the country. This question was incidentally involved in a recent case in the English courts of equity, where the Emperor of Austria sought to enjoin Louis Kossuth and one Day, the manufacturers, from preparing and issuing bills of credit in the name of the kingdom, or the king, of Hungary. No question seems there seriously to have been made by counsel or entertained by the court but that such bills, when lawfully issued, would constitute a portion of the lawful money of the empire: *Emperor of Austria v. Kossuth et al.*, 7 Jur. N. S. 483, before V. C. STUART; s. c. before Court of Ch. Appeal, Id. 639; 2 Story Eq. Ju. § 951 e.

It is declared in *Craig v. State of Missouri*, 4 Pet. 410, and is a fact in history familiarly known, that the states, before the adoption of the Constitution, had repeatedly exercised the power of issuing bills of credit and declaring them lawful tender for private debts, that is, making them lawful money. The confederacy, before the adoption of the Constitution, possessed no power over the subject of lawful tender, and were compelled to, as they repeatedly did, appeal to the states to declare the national bills of credit lawful tender.

This was one of the defects in the national authority, which it was the purpose of the Constitution to remedy. This was done by prohibiting the states from coining money or issuing bills of credit, or making any thing but gold and silver a tender for private debts. This in effect took from the states all power over the subjects, both of making money and declaring legal tender. This seems to be so regarded by Ch. J. MARSHALL, in *Craig v. Missouri*, *supra*, where he shows very clearly that both these functions are prohibited to the states. This must be so if the states could neither coin money or issue bills of credit, since this covers the whole subject of tender laws. And accordingly we find that Congress has always controlled the subject of tender since the adoption of the Constitution, and the states have never attempted to interfere. This, of itself, is such a practical construction of the

Constitution as must, on every sound principle, be regarded as settling the respective powers of the nation and the states over the subject of tender laws.

We think it fair too to say, that the entire power of making money is, by the Constitution, given to Congress. We have seen that it existed before the formation of the national government in all the states, and that it is now prohibited to them all. It must therefore exist in Congress, or not at all. If it had been the purpose of the Constitution to prohibit the power of issuing bills of credit and making them lawful tender, equally to the national government as to the states, it is impossible to conjecture why it should not have been done in the same or similar terms. The fact that both are distinctly and expressly prohibited to the states, and that not one word is said in regard to their being exercised by the nation, is certainly a very significant intimation that it was not deemed proper to extend the prohibition beyond the states, but to leave its exercise by the nation to the necessities and emergencies of after times, to be exercised or not according to future exigencies, the same as it exists in all free and sovereign states.

This is very obviously to be inferred from the consideration that the whole subject of issuing bills of credit and making them lawful money was familiar to the delegates, in the then recent experience of the times, and especially must it have been present to their minds in making such express provisions in regard to its exercise by the states. It could not, therefore, have been supposed the national government would never have occasion to exercise such a power, since that had very recently been done by a national government possessing far less automatic power than the one then about to be created, upon the basis of paramount national sovereignty. Nor is it fair to conclude that it was then supposed there could never arise an emergency where it might be necessary to declare these bills of credit lawful tender or lawful money; since the nation had just had experience of that same necessity and had appealed to the states for the exercise of that same power, which they were now in express terms prohibiting them from exercising in future. And if it had been the purpose to extinguish and utterly abolish this power everywhere, we can conjecture no good reason why that should not have been done in terms, either by prohibiting all bills of credit as lawful

money, or else declaring, as in regard to the states, that Congress or the nation should never make anything but gold and silver a lawful tender for private debts. We must surely conclude either that it was intended to abolish this known and important function of government or else leave its exercise to the nation.

Whether, therefore, we look for this power in the clause "To borrow money on the credit of the United States," or that "To raise and support armies," which is evidently but a subdivision of the former, or whether we find it embraced under the liberal and only sensible construction of the power to "coin money, regulate the value thereof, and of foreign coin," is not very material. It must be obvious to all that an instrument creating a paramount national sovereignty, and prohibiting the exercise of all sovereign national functions, such as making money, by the states, should not, except upon strict necessity, resulting from the terms used, be so construed as to destroy or essentially abridge so important and indispensable a national function as the creation of paper currency upon great and pressing emergencies; a function exercised by all commercial states in those trying exigencies which, as in all past history, always have occurred, so in all future time must be expected to occur.

We only desire further to say that it seems to us that the courts and the profession have manifested more refinement than wisdom in giving the clause in the Constitution, "to coin money," such a precise and literal interpretation as to exclude all paper money under all circumstances. In its most literal sense it will extend to all kinds of metal, to iron and tin, as well as gold and silver, and perhaps also to every substance capable of receiving and retaining an impression, for coining in its most literal import means nothing but stamping with a device. Any material, therefore, which can be stamped may be coined. And in that sense any impressible material, even paper, is susceptible of literal coinage. But the true construction unquestionably is, that the more common mode of creating money is here, by a figure of speech, put for the whole, and that "coining" money means nothing more than *making* money. For unless we do adopt this construction, there is no power by which money of gold and silver can be made in any other mode except coinage. It could not be done by weight, in the form of bars or bullion, or by stamping pieces of gold or silver, short of coinage, or by any other known or newly-discovered device. Such a narrow and literal construction

of language would never be adopted in regard to the interpretation of other written instruments. The *endorsement* of notes and bills, which literally imports an assignment upon the *back* of the instrument, may just as well be upon the face of the instrument, as has been often decided. So also a contract for the *manufacture* of cloth, or machinery, or any other thing, where it was susceptible of being done, either by hand, as the word literally imports, or by machinery, would never be received in a strict literal sense. All that is implied is, that it shall be so made as to answer the ordinary purposes and objects of such fabrics in the market. These illustrations might be carried to any extent. Any court which should assume to give language any such literal construction, in regard to an incidental and collateral matter, only implied from the etymology of the terms used upon any other subject, would shock the common instincts and common sense of mankind. And why that strict and extremely literal construction of this clause of the Constitution should be so strenuously insisted upon on this subject, any more than upon other portions of the instrument, is not easily explainable. If one of the most accurate of English writers could speak of "coining blood for drachmas," why may not a nation coin money in all the modes known at the time the power is created, and thus stamp its own paper with the quality of lawful money? Few men will argue that the government might not stamp the quality of money upon gold and silver without literally coining it, and if so, why may it not effect the same thing with its own paper, as no limitation is found, surely, in regard to the material of which money shall be made by the national authority? It may be of any metal or other material susceptible of coinage. The same thing may be effected by stamping such material. Is paper, therefore, certainly excluded? Can that be fairly said when it was one of the known modes of making money at the time, and present to the minds of the framers? If money may be coined out of paper, it is surely none the worse for containing the promise of the government.

It may undoubtedly be fairly argued that this power of emitting bills of credit and stamping them with the qualities of lawful money, was not intended to be given as the ordinary mode of making money. It was not expected the nation would attempt to do, under ordinary circumstances, what all nations regarded as destructive policy, except in times of war or extreme emergencies. The same is true of borrowing money, which is one of the express

powers granted in terms most unquestionable. No nation can borrow money for its ordinary current expenses and not come to ruin and bankruptcy, any more than an individual could do the same and not lose credit. Current expenses must be met by current income or all credit and character is lost, both personal and national.

To argue that no power to emit bills of credit and stamp them as lawful money was intended to be given to the nation, but that still this may be done in all great emergencies, when it is impracticable to maintain the national life in any other way, seems to us very nearly equivalent to saying that the power is not given at all as an ordinary function of government; but it may be resorted to, by way of spasmodic convulsion, in the last throes of existence! This seems to be an admission that it is not given but may be assumed *in articulo mortis*, the same as the people may resort to the inherent right of revolution when the oppressions of the existing government become intolerable! This is a species of legal construction not judicial in its character as it seems to us. We would sooner presume it, as a necessary incident of national sovereignty.

Such an argument seems to us rather political than legal; a function of the legislative or executive authority, rather than of the judiciary. If the power to emit bills of credit and stamp them as money is not given in the function of borrowing money and coining money, it seems to me, with submission, that it is not given at all. But it seems very clear to us that these express powers of borrowing money and making money must be supposed to have been given to be exercised, not only in all the then known and usual modes of doing those things, which will cover the present issue of treasury notes, but also in all future modes and emergencies which might be desirable as they should arise. This is the only mode of construing the Constitution which will make it answer the purpose of its adoption. Upon any other mode of construction a written constitution must become an intolerable hamper and impediment to the just development and growth of the national life, which should surely be avoided if the courts possess the power of rising to the demands of the exigencies of advancing time, which is one of the indispensable functions of judicial construction, and which can alone render written laws endurable.

I. F. R.

WASHINGTON, December 17th 1868.

## RECENT AMERICAN DECISIONS.

*Supreme Court of Errors of Connecticut.*

## GEORGE A. HAWKINS AND OTHERS: APPEAL FROM PROBATE.

The Bankrupt Act does not absolutely and totally suspend or abrogate state insolvent laws.

A voluntary assignment by a debtor, good at common law and made in the form prescribed by the insolvent law of the state, held valid, although the United States bankrupt act was in existence and applicable to the case at the time of the assignment.

And the proceedings of the probate court in administering upon the insolvent estate so assigned held valid.

APPEAL from sundry decrees of a court of probate in the settlement of an insolvent estate, assigned for the benefit of creditors under the insolvent law of the state, taken to the superior court in Windham county, and reserved by that court for the advice of this court. The case is sufficiently stated in the opinion.

*Penrose* and *Phillips*, for the appellants.

*Halsey*, for the appellee.

CARPENTER, J.—On the 6th day of August, 1867, J. and W. Cocking, partners in business, made an assignment of their property to trustees, for the benefit of their creditors under the insolvent laws of this state.

The Bankrupt Law of the United States, approved March 2d 1867, was then in full force. The trustees were proceeding with the settlement of said trust, under the direction of the court of probate, when, on the 23d day of October 1867, the appellants, being creditors, appealed to the superior court from certain decrees of the court of probate relative thereto.

The reasons for appeal, which are demurred to, show that the case is within the purview of the Bankrupt Act. The appellants claim that the effect of the Bankrupt Act was to suspend the Insolvent Law of this state *in toto*. The appellees claim that the state law exists in full force until the Bankrupt Law attaches itself to the person or property of the debtor by proceedings in bankruptcy. The appellants in support of their position cite, among other cases, the case of *Griswold v. Pratt*, 9 Metcalf 16. In that case it was directly decided that the national Bankrupt

Act of 1841, *ipso facto* suspended and abrogated, during the continuance of such law, the insolvent law of the state of Massachusetts. The appellees rely upon *Ziegenfuss's Case*, 2 Iredell's Law R. 463, which sustains the broad position assumed by them. The decision of this question does not seem to us essential to a disposition of this case. This assignment was voluntary on the part of the debtors. There is nothing in the case to show that any fraud was intended, or that the parties were attempting to defeat the operation of the Bankrupt Act. So far as appears the assignment, and the proceedings under it, were but the means adopted by the parties for distributing the effects of the insolvent debtors *pro rata* among all their creditors.

It is to be noticed that our Insolvent Law does not give validity to assignments under it. It simply provides that unless such assignments are made in a certain manner they shall be void; and they derive their force from the common law, and not from the statute. All that the statute supplies is the mode of administering the insolvent estate under the assignment. But these provisions of the statute, which have for their sole object the distribution of the estate among the creditors *pro rata*, in the most economical and expeditious manner, are nothing but what the assignment itself might contain and express. In that case, the case would become merely one of a private trust, needing no help from any statute, and which could be enforced by a court of equity like any other trust. These assignments are generally, perhaps always, made in express terms "under the statute," &c., which is equivalent to an incorporation of all the provisions of the statute in the assignment itself; in which case the trust would be complete without any aid from the statute, and the settlement of the insolvent estate would proceed under the trust thus created precisely as under the statute, except that what is now done under orders of the court of probate, would be done under the terms of the trust, and under the supervision of a court of chancery. The debtor may, if he and the creditors can agree, make a distribution of his effects without the aid of law. Such a transaction would not be adjudged illegal. He may, so far as he is concerned, permit his property to be taken by process of attachment under a state law, and thereby prevent a distribution of his effects by the Bankrupt Act; yet it will not be contended that the operation of all attachment laws is suspended. Upon the same principle we see

no reason why he may not distribute his effects through the instrumentality of the insolvent laws of the state, so long as the rights of creditors are not thereby prejudiced. The record discloses nothing to indicate that creditors will suffer unjustly from this proceeding. We cannot say as matter of law that the assets of the debtors can be administered more economically or expeditiously in the United States courts than in the state courts. It is true creditors took this appeal. What motive induced them to do so does not appear. It is suggested, however, that a lien in their favor, created by attachment, was dissolved by the assignment. If so, and the assignment is invalidated and the lien preserved, they thereby gain an advantage over other creditors. As that would contravene the policy of the Bankrupt Act, as well as of our own law, we should hardly feel disposed to sanction the appellants' claim, as applied to this case, unless the law rigidly demanded it. Under the circumstances we think that such an assignment as the one here in question may be sustained, without deciding that a state insolvent law authorizing an assignment in insolvency, which would be unauthorized without the statute, would not be suspended by the United States Bankrupt Act.

Since this case was argued our attention has been called to a decision by Judge NELSON, in the Circuit Court of the United States for the Southern District of New York, having an important bearing upon the question now under consideration. The case was *John Sedgwick, Assignee, v. James K. Place and Others*, reported in the Weekly Bankrupt Register, vol. 1, p. 204 (June 29th 1868). In that case the bankrupts, being insolvent, suspended payment November 20th 1867, and soon after made an assignment of their property to trustees for the benefit of all their creditors under a statute law of the state of New York. In February following they applied by petition for the benefit of the Bankrupt Act. They were adjudged bankrupts and an assignee was appointed. The assignee filed his bill against the assignees under the state law, praying that the assignment under the state law be set aside, and the assignees render an account to the assignee in bankruptcy, and that they be restrained from any further execution of the trust. The court, in dismissing the bill, says: "We find nothing in the provisions of the law which would authorize us to take this property out of the hands of the assignees under the state law and turn it over to the assignee in bankruptcy, and must therefore deny the motion for a preliminary injunction."



It does not appear clearly from the report of that case, but we suppose the fact to be, that the respondents were not acting under the insolvent laws of the state of New York, but under another act, regulating private trusts created by the act of parties for the benefit of creditors. But, viewing our law as practically a system introduced for the purpose of sequestering the effects of an insolvent debtor and distributing the avails *pro rata* among creditors, and considering that the action of the court of probate in the decrees appealed from is not inconsistent with this view, we have no difficulty in bringing the case within the ruling of Judge Nelson.

On the whole we are inclined to the opinion that the proceedings in the case now before us are not in conflict with the Bankrupt Act. We therefore advise the superior court that the reasons for appeal are insufficient.

In this opinion the other judges concurred.

The foregoing cases adopt a somewhat more restricted construction of the operation of the national bankrupt laws, than has perhaps been generally entertained by the profession. It seems to have been generally supposed that while the power given the National Congress to enact a general bankrupt law, under the Constitution, has no effect in restricting the exercise of the same power by the States, until the same is put in exercise by the national authority, its actual exercise must *ipso facto* nullify the operation of state laws in the abstract. The question is discussed very much at length by Dewey, J., in *Griswold v. Platt*, 9 Met. 9, and the cases cited in detail. The doctrine of this case, and of others here cited, seems to be that the passing of a bankrupt law, by the national authority, suspends the operation of all State laws upon the subject, except where proceedings had been already instituted, as in *Judd v. Ives*, 4 Met. 401, in which case the State laws have been allowed a modified operation, to the extent of pending proceedings. This modified exception seems to recognise the principle, that the existence of the national law does not entirely and

at once exclude the operation of the State laws upon the same subject. And the principle thus established on the subject, in *Sturges v. Crowninshield*, 4 Wheat. 196, *Ogden v. Saunders*, 12 Id. 213, that the existence of the power in the nation will not preclude its exercise by the States, actually recognises the necessary corollary, that the national statute only abrogates state authority to the extent that it is inconsistent with its exercise under state laws. This being so, we do not see any serious objection to any proceedings under state laws, which are not intended to accomplish any purpose in conflict with the national law or to supersede any proceedings under such law. The result of such a distinction would seem to be that until proceedings are taken under the national law, it is competent for the parties to take any proceedings under state statutes or common law, which are not in conflict with the principles of the national law so as operate a virtual fraud upon its provisions. This seems to be the principle of the rule laid down by Mr. Justice NELSON and approved in the principal case.\*

I. F. R.

*Court of Appeals of New York.*

LUCY A. WARNER ADMX., RESPONDENT; v. THE ERIE RAILWAY COMPANY, APPELLANT.

A railroad company in its character of master is responsible to its employees for the proper construction of its road, its adjuncts and equipments, and the selection of competent and skilful subordinates to supervise, inspect, repair, regulate and control its operations. If it fails in any of its duties in these respects, and its servant thereby sustains injury, he may recover.

If, however, these obligations are once performed, and its structures are properly made, and it employs from time to time competent and trustworthy agents to examine and test the continued sufficiency of such structures, and these tests are applied with the frequency and in the manner which time and experience have sanctioned, no action will lie though its structures turn out to be insufficient and the servant in consequence is injured. The board of directors as representing the company is under no further duty to such servant. It cannot be held to warrant the actual competency of his fellow servants. Actual notice of insufficiency must be brought home to such board of directors as representing the corporation, as a prerequisite to liability.

Where, under such circumstances, a bridge belonging to the company fell while the plaintiff in the course of his employment was passing over it upon a train :

*Held*, in the absence of notice of its insufficiency, that it was error to leave the question of negligence to the jury.

THIS was an action to recover damages arising from a personal injury, which resulted in the death of one of the defendants' employees. The deceased was a baggage-man, and when killed was in the discharge of his duty as such on a train of cars going from Hornellsville, east, on the defendants' railroad. One of the defendants' bridges, over the Conhocton river, fell as the train of cars was passing over it.

The jury found that the bridge fell from decay in its timbers. The bridge was properly constructed and was originally of sufficient strength for the purposes for which it was intended.

*John Ganson*, for appellant.

*Sherman T. Rogers*, for respondent.

BACON, J.—In approaching the consideration of this case, which, in the precise aspect it assumes, may be deemed in the courts of this state a pioneer case, it is important to distinguish the principles which are to decide it from those which have been held in cognate cases, and especially to ascertain the precise ground on which the charge and rulings of the judge upon the

trial proceeded, and by which we are to assume the jury were guided in rendering their verdict.

In the first place, then, it is to be remarked that the defendant in this action is not responsible, and is not to be made liable for injuries suffered by one of its employees solely through the carelessness or negligence of another employee of the defendant engaged in the same general business. The liability to injury from such a source is one which each employee takes upon himself when engaging with others in the service of a common master. It is a hazard incident to the nature of the engagement into which he entered, and in respect to which he becomes, so to speak, his own insurer.

In the second place, the cases which establish this general rule, maintain also the further qualification or extension of it, that the liability is not enlarged by the fact that an injured employee is of an inferior grade of employment to that of the party by whose carelessness the injury is inflicted and the damage caused, provided the services of each in his particular sphere or department are directed to the accomplishment of the same general end. These principles have been often under discussion, and are settled by an array of authorities which it is hardly necessary to cite in detail. The following, among many others, may be deemed sufficient for the purpose: *Priestly v. Fowler*, 3 Mees. & Wels. 1; *Coon v. Utica and Syracuse Railroad Co.*, 5 N. Y. 492; *Albro v. Agawam Canal Co.*, 6 Cush. 75.

The only ground then, which the law recognises, of liability on the part of the defendant, is that which arises from personal negligence, or such want of care and prudence in the management of its affairs or the selection of its agents or appliances, as occasioned the injury, and which care, if it had been exercised, would have averted the injury. We are not now dealing, it must be remembered, with the liability which railroad corporations assume in respect to the safety and security of passengers on their road transported for a compensation, and in regard to whom they become absolute insurers against all defects which the highest degree of vigilance would detect or provide against. The liability here, if there is any liability, is measured by that lower standard which all the authorities recognise in the case of an employee, and which is answered if the care bestowed accords with that reason-

able skill and prudence which men exercise in the transaction of their accustomed business and employments.

The ground of liability affirmed in this case, and on account of which a recovery was had, was the alleged weakness, decay, and defectiveness of a bridge of the defendant, by the falling of which the death of the intestate was occasioned. The allegations of the complaint are that the defendant did not use ordinary or reasonable care and diligence in providing a safe and suitable bridge over the Conhocton river at the place in question. That before the breaking down of the bridge the defendant had notice that it was unsafe and insecure for the passage of trains thereon, and that defendant carelessly and negligently failed to cause a suitable examination to be made of said bridge for the purpose of ascertaining whether it was unsafe and insecure. It is further alleged that if any examination was made it was made by servants and agents who were careless and incompetent to the knowledge of the defendant, and in the selection and employment of whom the defendant had not used ordinary care and diligence. With these allegations in view, as constituting in the mind of the pleader the gravamen of the action, let us see what the case really disclosed, and in what aspect it was presented to the jury.

At the close of the plaintiff's testimony there was a motion to nonsuit the plaintiff, founded on the alleged absence of a notice to the defendant of the unsafe condition of the bridge, and this motion was renewed at the close of the whole testimony. The judge, in responding to this demand, held that there was not any evidence for the jury to consider relative to the original sufficiency of the bridge, nor any testimony impeaching the competency of the defendant's employees. He further stated that there was only one question for the jury, and that was, whether the board of directors themselves, as representing the defendant, and as distinguished from the employees, were guilty of negligence in not discovering the fact that the bridge was in an unsafe condition; that if the jury should be satisfied that the bridge was unsafe from decay and that occasioned its fall, and the directors were guilty of negligence in not discovering the fact, the plaintiff would be entitled to recover and that this question alone must go to the jury. To all which the defendant's counsel excepted.

At the close of the charge there was a request to instruct the jury in relation to the actual knowledge of the defendant's em-

ployees, and their omission to remedy such known defect, assented to by the court, which if the defendant's counsel had been content to stand upon, would have entirely precluded a recovery in this case; but I agree with the opinion of the Supreme Court that this request and instruction was virtually waived by the counsel, and revoked by the court in the subsequent ruling, and that it may therefore, on this appeal, be laid out of the case.

The first instruction of the court in answer to a request to charge that it was necessary to show that the decay was known by some notice or otherwise to the president and directors, was that if the board of directors by the exercise of that care and skill that is to be expected of persons occupying the same position, could by the exercise of reasonable diligence and skill have ascertained or known the defects in the bridge, the failure on their part to ascertain would make the defendant liable, because it is negligence, and substantially the same as if notice had been given to the board. To this proposition the defendant's counsel excepted.

There is a little vagueness, and perhaps inaccuracy, in the expression used, as to the care and skill which was "to be expected in persons occupying the same position," which might possibly have tended to mislead or confuse the jury, had not the judge in the earlier part of the charge explained, that the care and diligence which the directors were required to bestow, was that reasonable care, skill, and foresight in the affairs of the corporation, which reasonable and prudent men occupying such positions ordinarily exercise under the same circumstances. With this qualification, I think the charge is not liable to any serious misconstruction, and presents with sufficient distinctness the proposition the judge was expected to charge, and the one he actually presented to the jury. Let us see now what the case disclosed upon the concession of all the parties, and upon clear and uncontroverted evidence. We start with the admission that there was no question as to the original sufficiency of the bridge, and no impeachment, whatever, of the competency of the defendant's employees. Two leading and important averments of the complaint are thus disposed of *in limine*. It is then proved by evidence not sought to be contradicted, that by these competent agents a frequent inspection and examination of the bridge was made, the usual and accustomed tests long employed and deemed ample and sufficient were applied to the structure in its various

parts, and no imperfection or decay was detected, and none was visible upon an outward and external inspection; and, on the day before it fell, a special observation was made of the bridge while a heavy train was passing over it, and no imperfection or weakness was discovered. If it be said that the test of boring the timbers was not applied, the answer may very well be, that this is no more a certain test than the one which was applied; that it had but rarely been used upon the bridges on the defendant's road, and, so far as the testimony shows, upon any other, and carried too far becomes itself a source of weakness; and that while after a catastrophe has occurred, it is sometimes easy, and quite common to say that if something else unusual and unthought of had been done, it might possibly have been averted. Ordinary care and diligence, which is the acknowledged measure of the defendant's obligation, does not require the application of these unusual tests, nor the employment of the utmost possible safeguards.

There was one more element invoked to attach liability to the defendant consequent upon the fall of this bridge, and that was the length of time it had stood. It was constructed in the fall of 1855, and had remained until the time of the accident, a period of about nine and a half years. The evidence showed that bridges of similar construction and materials, upon the defendant's road, had stood over ten years, and were considered, and to all appearances were, sound and safe—some had stood over fourteen years, and one over seventeen years in the same condition. Although some of the witnesses for the plaintiff testified that they would not consider such a bridge as safe beyond the period of seven or eight years, yet, if upon adequate and repeated inspection, and the application of appropriate tests, no defect was exhibited, a mere opinion as to the length of time such a bridge might be expected to stand, would have no appreciable weight in the scale of evidence. There is really then no conflict of evidence as to the care and skill used in the construction and maintenance of this bridge; the inspection to which it was subjected; the adequate skill and competency of the employees engaged in that specific duty; the experience of defendants both in the construction and duration of such structures; and the absolute want of any actual notice to defendant, or any of its employees, of any defect, real or suspected, in this bridge. And this being so upon undisputed evidence, the conclusion in my judgment is inevitable, that

the defendant was not guilty of the want of such care in respect to their employees, as it was their duty (representing, as it is conceded the board of directors do, the corporation) to bestow upon its affairs. If this conclusion is sound, then it seems very clear to me, that it was the duty of the court to take the case from the jury, and hold that on the established facts the plaintiff could not recover. But that at all events the defendant was entitled to the instruction the counsel asked, to wit, that in order to charge the defendant, it was necessary for the plaintiff to show that the decay in the bridge (if it fell from decay) was known by some notice or otherwise to the president and directors of the road.

The true principle applicable here is, I think, that when the defendant has erected a structure to be used in its ordinary and accustomed business, without fault as to plan, mode of construction, and character of materials, so that it was originally sufficient for all the purposes for which it is to be used, employs skilful and trustworthy agents to supervise, examine and test it, and that duty is performed with frequency, and with such tests as custom and experience have sanctioned and prescribed, it has exercised such care and skill as the law exacts of an employer in reference to his employee; and that no liability can attach to a party for a defect in such structure, by which an employee has sustained an injury, unless there has been actual notice or knowledge that defects existed, which, unless promptly remedied, would be liable to produce serious or fatal consequences.

A broader liability than this cannot be imposed without, in my opinion, breaking down and obliterating the distinction which exists between the responsibility incurred to a passenger and an employee; and the rule laid down by the court in this case, would practically make the railroad company an insurer of the latter, as well as of the former, and in the words of a learned judge in a parallel case, "a latent defect in a steam boiler, a rotten plank in a ship, a flaw in an iron rail, an unknown weakness in a floor, would charge the master with all the damages to his employees in consequence thereof."

A different and more stringent rule than I have thus suggested, would impose an intolerable burden upon a board of directors, and carried to its legitimate results, would require them to give their individual and personal attention not only to the construction, but to the actual existing condition of their road, with all its struc-

tures, appliances, and machinery. They must supervise and constantly examine every locomotive, passenger and freight car, rail, tie, wheel, axle, and brake, and be responsible for the consequences that may arise to an employee, for a latent defect not cognisable by the senses of an experienced and skilful mechanic, nor capable of detection by the faithful application of well-known, long-used, and approved tests. The doctrine upheld by the court in this case maintains, in effect, that a railroad corporation must have a board of directors not only possessing adequate skill to determine whether its competent employees perform their duty as between the corporation and its other employees; but if there be an omission of duty on the part of such skilful employees which the directors have themselves failed to discover, the corporation is guilty of negligence, and responsible to an injured employee for all the consequences resulting therefrom. Such a rule I am persuaded would carry their corporate liability not only beyond reason, but beyond the fair scope of any authority which has been invoked to maintain it.

I do not think it would be profitable to go over in detail the long array of authorities which have been cited by the counsel on both sides in this case, to sustain and fortify their respective positions. They have been mostly collected, and the purport of them very fully and fairly stated in the opinion prepared by Mr. Justice MILLER upon the former argument of this case. I have carefully examined them, but shall not venture to collate or comment upon them, further than to remark, that while on the one hand some of them contain statements and discussion of principles that may be invoked in favor of the claim to recover, put forth by the plaintiff's counsel, and sustained upon the trial of this cause, none of them go the full length required to uphold the ruling of the judge, while on the other hand, several cases go far, as I understand them, in maintaining the doctrine I seek to apply to this case, and in one instance the decision is fully and directly in point.

Thus in *Torrent v. Webb*, 18 C. B. (86 E. C. L. R.) 795, it is held that a master is not responsible for an injury to a servant for the negligence of a fellow-servant, provided the master uses reasonable care in the selection of the servant. JERVIS, C. J., in this case makes the significant remark, that the master may be



responsible where he is personally guilty of negligence, but certainly not where he does his best to get competent persons.

In the leading case of *Priestly v. Fowler*, 3 M. & W. 1, it was held that the servant could not recover of the master for injuries resulting from the breaking down of an iron railing from defective construction, when there was no proof of knowledge on the part of the master of the defect: Lord ABINGER remarking, that the mere relation of master and servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself.

In our own state, the point has never been fairly presented. In *Keegan v. Western Railroad Co.*, 4 Seld. 175, the defendant had express and repeated notice through the reports of its own servants, of the defectiveness of the engine, through the explosion of which the injury to the plaintiff was occasioned. In *Ryan v. Fowler*, 24 N. Y. 410, the master had the same notice of the defectiveness of the structure, through the falling of which the plaintiff suffered the injury for which he recovered.

In *Wright v. New York Central Railroad Co.*, 25 N. Y. 562, a recovery by an employee against the company for an injury occasioned by the conduct of another employee, was set aside on the ground that the action could not be maintained unless the injury resulted from unskilfulness for which the company was responsible.

In discussing the principle applicable to cases of this character, Judge ALLEN says: "If the injury arises from a defect or insufficiency in the machinery or implements furnished by the master, knowledge of the defect or insufficiency must be brought home to the master, or proof given that he was ignorant of the same, through his own personal negligence or want of care; in other words, it must be shown that he either knew, or ought to have known, the defects which caused the injury. Personal negligence is the gist of the action."

We have been referred to a number of cases in the courts of our sister states, none of which are very apposite to this precise case, except *Snow v. Housatonic Railroad Co.*, 8 Allen 441, which the plaintiff's counsel invokes as a clear authority in his favor, but which is susceptible of the criticism that the defect in the track through which the injury was suffered, was palpable to view, and was known to and was very grossly neglected by the track

repairer, whose specific duty it was to remedy the defect ; and the case of *Hand v. Vermont Central Railroad Co.*, 32 Verm. 473, which is precisely in point for the defendant, and holds this distinct proposition, that although it is the duty of a railroad corporation to exercise all reasonable care in procuring sound machinery and faithful and competent employees, and although they are liable to their servants for the neglect of this duty, yet after having performed it, they are not liable to a servant for injuries occasioned by the neglect of any of his co-servants engaged in the same general business, even though the negligent servant be superior in grade to the one injured.

It is said, and it may be conceded, that this case is in advance of any decision yet made, where the precise principle is involved ; but, if so, it is in my opinion a sound and judicious advance. It does not exonerate the directors of a railroad corporation from liability for personal negligence, nor discharge them from the obligation to perform their duty, if notice or knowledge of defects or insufficiencies is brought home to them, and injury results to one of their servants from a failure to remedy the defect through which the injury occurs. It holds them to the highest measure of responsibility for the proper construction of the road, its adjuncts, and equipments, and the selection of competent and skilful subordinates to supervise, inspect, and repair, and control and regulate its operations ; but, having faithfully performed these duties, it relieves them from the extreme rigor of a rule which would practically make them insurers of the absolute safety of, and underwriters for every injury which an employee in their service might suffer from the act or omission of his fellow-servant.

Since the argument of this case, and the preparation of the foregoing opinion, my attention has been called to the case of *Wilson v. Merry*, decided in the English House of Lords, in May 1866, and reported in the Law Reports, Appellate Series, part 3d, for July 1868, p. 326. It was a Scotch appeal in a case where a verdict had been recovered against the proprietors of a coal-mine, for the death of a party, occasioned as was alleged, by the defective construction of a scaffold in the mine. Without recapitulating the facts, it may be sufficient to state that the case turned upon the liability of the master for an injury to his employee, where the master did not personally superintend the work, but devolved it upon a suitable mechanic or foreman, superior in grade to the injured employee.

Opinions were given by the Lord Chancellor, Lord CAIRNS, and by the ex-Chancellors, Lord CRANWORTH and Lord CHELMSFORD, all substantially concurring in the conclusion, that the duty of the master was to select proper and competent persons to do the work, and furnish them with adequate materials and resources for its accomplishment; and when he had done that, he had performed his whole duty. In the course of his opinion, Lord CAIRNS says: "The master is not, and cannot be, liable to his servant, unless there be negligence on the part of the master, in that which he the master has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business; but to select proper and competent persons to do so, and furnish them with adequate materials and resources for the work." He adds: "If the persons so selected are guilty of negligence, this is not any negligence of the master; and if an accident occurs to a workman to-day, in consequence of the negligence of another workman—skilful and competent—who was formerly, but is no longer in the employment of the master, the master is not liable, although the two cannot technically be described as fellow-workmen; negligence cannot exist, if the master does his best to supply competent persons. He cannot warrant the competency of his servants." The case is very instructive, as containing the latest utterance of the highest court in England, and the opinions of all the learned Lords maintain, with great distinctness and force, the principle of liability which I have endeavored, as well as I was able, to illustrate and enforce in the foregoing opinion, and which should, I think, govern in the disposal of this case.

The judgment should be reversed, and a new trial granted, with costs, to abide the event.

Judgment accordingly, five judges concurring therein.

*Supreme Judicial Court of Massachusetts.*

SAMUEL P. SHAW v. A. W. SPENCER AND OTHERS.

The holder of stock as trustee has *prima facie* no right to pledge it as security for his private debt, and one who takes it under such circumstances does so at his own peril.

The word "trustee" in the certificate is notice to all persons to whom the certificate may be delivered, sufficient to put the taker on inquiry as to the nature of the trust and the lawfulness of the pledge.

No usage of brokers or course of business can avail against these rules of law, and therefore evidence of such usage is inadmissible.

Where the equitable owner of stock which has been pledged unlawfully by the trustee, has given notice of his rights to the pledgee, his mere presence and failure to object to the payment by the pledgee, of an assessment on the stock, does not stop him from the legal assertion of his title, though equity will require him to refund the amount so paid.

BILL in equity against Spencer, Vila & Co. and Mellen, Ward & Co., two firms of brokers in Boston, and the Calumet Mining Company, a corporation under the law of Michigan, praying for an injunction to restrain Spencer, Vila & Co. from making any sale or transfer of two thousand shares of the stock of that company, or of the certificates of the same, and the company from recognising the validity of any such sale or transfer otherwise than to the complainant.

At the hearing before WELLS, J., the material facts appeared as follows: On the 28th of February 1867, Spencer, Vila & Co. received from New York United States bonds to the amount of \$100,000, with a draft for \$106,735 on Mellen, Ward & Co., to whom they were to deliver the bonds on payment of the draft. Mellen applied for, and obtained, the bonds, promising to return with currency or a cashier's check, which he did not do. Mr. Vila, after calling once or twice unsuccessfully at the office of Mellen, Ward & Co. for the money, at last saw Mellen, who offered his check for the whole amount, which was refused. Mellen then offered a check of Kidder, Peabody & Co. for \$50,000, and the check of Mellen, Ward & Co. for the balance with collateral security, this latter check to go into the bank the next day. This proposal was accepted, and just before two o'clock (the hour of the closing of the Boston banks), the collateral security was delivered to Spencer, Vila & Co., and the check was deposited. The collateral security thus taken consisted of two

certificates for one thousand shares each of stock in the Calumet Mining Company, standing in the name of "E. Carter, trustee," with a transfer in blank on the back of each, subscribed "Edward Carter, trustee" (Carter being a member of the firm of Mellen, Ward & Co.); and the certificates were expressed to be "transferable only on the books of the company, by the holder thereof, in person, or by a conveyance in writing recorded in said books, and surrender of this certificate," and were dated February 7th. The blank transfers were dated February 8th. The shares which these certificates represented had been owned by Quincy A. Shaw, and were part of a larger number which he had transferred to certain trustees, including himself and the complainant, to secure certain indebtedness, and which these trustees afterwards transferred to the complainant. And they had been transferred by the complainant into the name of "E. Carter, trustee," as collateral security for certain acceptances made by Quincy A. Shaw on drafts of the Huron Mining Company, which had been taken by Mellen, Ward & Co. for negotiation, who gave for them the following receipt:—

"Boston, February 8th 1867. Received of S. P. Shaw two certificates of stock in the Calumet Mining Company of Michigan, being for two thousand shares in all, each certificate being of one thousand shares, to be used as collateral for acceptances of Q. A. Shaw of Huron Mining Company drafts, which we bind ourselves to return to said S. P. Shaw whenever said acceptances are paid. Said certificates are in the name of E. Carter, trustee.

"MELLEN, WARD & Co."

On the 28th of February nothing was due to Mellen, Ward & Co. on these acceptances. On March 1st, Mellen, Ward & Co. failed, and their check which Mellen gave to Spencer, Vila & Co. was dishonored, and remains unpaid. On that day Mr. Farley, a member of the firm of Spencer, Vila & Co., filled the blanks in the transfers of the certificates with the name of that firm, and presented them to Quincy A. Shaw as transfer-agent of the Calumet Mining Company, with a request for the transfer to be made and new certificates to be issued in the name of the firm, which was at first declined by Mr. Q. A. Shaw on the ground that he wished to make some inquiries, and afterwards on the ground that an assessment of \$5 per share which had been made on the capi-

tal stock was due and unpaid on the shares in question. The next day Mr. Q. A. Shaw heard that Spencer, Vila & Co. held the stock as security for a debt of Mellen, Ward & Co., and not as collateral for Huron Mining Company paper, and addressed to them the following notice: "Boston, March 2d 1867. Messrs. Spencer, Vila & Co.,—Please to take notice that the certificates of stock of the Calumet Mining Company in your hands, and in the name of E. Carter, trustee, are my property, and that I have never received value thereon. Please hold them subject to my direction. Yours respectfully, QUINCY A. SHAW, for self and others, trustees." During the few days following, Mr. Q. A. Shaw had several conversations with Mr. Vila, in which he proposed to submit the question of the title to the stock to certain referees, which proposition Mr. Vila declined. About this time the complainant became president, and Mr. Q. A. Shaw treasurer, of the Calumet Mining Company; and, on March 18th, at the office of the company, Mr. Vila paid the assessment due on the shares in question to the treasurer, in the presence of the complainant, who made no demand for the stock on that occasion. The next day, Mr. Q. A. Shaw returned the amount of this payment to Spencer, Vila & Co. in a letter subscribed like his former letter above recited, and stating that "the assessment was paid and received by mistake," and that the stock was owned by himself; but they refused to receive the amount thus returned. On March 26th, the complainant served notice on the firm that the stock was his property, and requested them to deliver to him the certificates with such endorsements as would enable him to obtain it; and on the same day he filed this bill.

The respondents offered testimony to show: "1. That it is usual with dealers in the stock market to deliver, by way of sale or pledge, certificates of stock, with a blank transfer upon the back; 2. That it is usual for holders of certificates of stock, transferred in blank, to fill them up by inserting the name of some person as transferee or purchaser; 3. That it is a matter of common occurrence for certificates of stock to be issued in the name of some other person as trustee, when in fact there is not any trust; 4. That certificates of stock, issued to a designated person as trustee, are constantly bought and sold in the stock market, by a simple endorsement of the certificate by the person named as the holder, without inquiry as to the authority by which,

or as to the use or purpose for which, the transfer was made." But the judge ruled that, "as to the first two, the facts proposed to be shown were immaterial; and, as to the last two, by the rules of law they were inadmissible."

*S. Bartlett* and *F. Bartlett*, for the complainants.

*B. R. Curtis*, *C. B. Goodrich* and *J. M. Keith*, for the respondents.

The opinion of the court was delivered by

FOSTER, J.—The court have bestowed upon this case a degree of attention commensurate with the importance of the principles on which its decision must depend and the magnitude of the amount involved. One of two innocent parties must bear a heavy loss, caused by the gross fraud of a third person.

Under the circumstances disclosed by the evidence it was a flagrant breach of trust, and a criminal fraud on the part of Carter to transfer the certificates of stock to Spencer, Vila & Co. They were the property of the complainant, who is entitled to reclaim them from any one but a *bond fide* holder for value without notice. Charles Mellen, a member of the firm of Mellen, Ward & Co., as collateral security for a debt due from that firm to Spencer, Vila & Co., handed to them two certificates of stock in the Calumet Mining Company, for 1000 shares each, standing in the name of another member of that firm, viz., "E. Carter, trustee," and by him transferred in blank. Spencer, Vila & Co. received the certificates thus endorsed in blank with the name of E. Carter, trustee, for a valuable and adequate consideration, without other notice of any defect in title than such as the law may impute from the word "trustee" in the body of the certificates and after the signature of Carter upon the blank transfers.

It is clear that a certificate of stock transferred in blank is not a negotiable instrument: *Sewall v. Boston Water Power Co.*, 4 Allen 282. Each of these certificates is expressed on its face to be "transferable only on the books of the company by the holder hereof in person, or by a conveyance in writing recorded in said books, and surrender of this certificate." No commercial usage can give to such an instrument the attributes of negotiability. However many intermediate hands it may pass through, whoever would obtain a new certificate in his own name must fill out the

blanks, as they were filled in the present instance, so as to derive title to himself directly from the last-recorded stockholder, who is the only recognised and legal owner of the shares.

It cannot possibly be material whether the manual delivery of the certificates was by Mellen or by Carter himself. Unless the word "trustee" may be regarded as mere *descriptio personæ*, and rejected as a nullity, there was plain and actual notice of the existence of a trust of some description. A trust as to personalty or choses in action need not be expressed in writing, but may be established by parol. And that the mere use of the word "trustee" in the assignment of a mortgage and note imports the existence of a trust, and gives notice thereof to all into whose hands the instrument comes, has been expressly decided by this court: *Sturtevant v. Jaques*, 14 Allen. See also *Bancroft v. Corsen*, 13 Id. 50; *Trull v. Trull*, Id. 407. It is insisted on behalf of the respondents, that even if there was actual notice of the existence of a trust there was no notice of its character, and that the trust might have been such as to authorize the transfer which was made by Carter. But, in our opinion, the simple answer to this position is, that where one known to be a trustee is found pledging that which is known to be trust property to secure a debt due from a firm of which he is a member, the act is one *primâ facie* unauthorized and unlawful, and it is the duty of him who takes such security to ascertain whether the trustee has a right to give it. The appropriation of corporate stock held in trust, as collateral security for the trustee's own debt, or a debt which he owes jointly with others, is a transaction so far beyond the ordinary scope of a trustee's authority, and out of the common course of business, as to be in itself a suspicious circumstance, imposing upon the creditor the duty of inquiry. This would hardly be controverted in a case where the stock was held by "A. B., trustee for C. D." But the effect of the word "trustee" alone is the same. It means trustee for some one whose name is not disclosed; and there is no greater reason for assuming that a trustee is authorized to pledge for his own debt the property of an unnamed *cestui que trust* than the property of one whose name is known. In either case it is highly improbable that the right to do so exists. The apparent difference between the two springs from the erroneous assumption that the word "trustee" alone has no meaning or legal effect.



Inasmuch as such an act of pledging property is *primâ facie* unlawful, there would be little hardship in imposing on the party who takes the security, not only the duty of inquiry, but the burden of ascertaining the actual facts at his peril. Where a partner assumes to give for his own private debt the note of his firm, the creditor who takes it must show that it was given with the assent of the other partners, because it is an apparent misuse of the name of the firm, and *primâ facie* evidence of fraud: *Eastman v. Cooper*, 15 Pick. 290. But we need not go to that length in deciding the present case. Notice of the existence of a trust is by all the authorities held to impose the duty of inquiry as to its character and limitations. And whatever is sufficient to put a person of ordinary prudence upon inquiry is constructive notice of everything to which that inquiry might have led.

The objection that in the present case the only persons of whom inquiry could have been made were Mellen and Carter, who committed the breach of trust, is sufficiently answered by the words of Sir JOHN ROMILLY, Master of the Rolls, in a recent and leading case. "With respect to the argument that it was unnecessary to make any inquiry because it must have led to no results," he says, "I think it impossible to admit the validity of this excuse. I concur in the doctrine of *Jones v. Smith*, 3 Mylne & K. 699, that a false answer or a reasonable answer given to an inquiry made, may dispense with the necessity of further inquiry; but I think it impossible beforehand to come to the conclusion that a false answer would have been given which would have precluded the necessity of further inquiry. A more dangerous doctrine could not be laid down, nor one involving a more unsatisfactory inquiry, viz., a hypothetical inquiry as to what A. would have said if B. had said something other than what he did say:" *Jones v. Williams*, 24 Beav. 62. These remarks also explain the cases cited by the respondents, of *Buttrick v. Holden*, 13 Met. 255, and *Calais Steamboat Co. v. Van Pelt*, 2 Black. 377. In each of these cases the party did make inquiry and relied upon the answers received, which were of a character calculated to put him off his guard.

If it be asked of whom the respondents could have inquired as to the meaning of the words "E. Carter, trustee," the nature of the trust thereby indicated, and the existence of the power to pledge for the debts of the firm of Mellen, Ward & Co., which Carter was assuming to exercise? the answer is, that the inquiry

could have been made of Mellen, and if he replied that he did not know the nature of the trust, then the duty of the respondents would have been to ask Carter himself for an explanation, which it certainly was in his power to give. It is not to be assumed that false answers would have been made, and the respondents have been thereby deceived and misled. On the contrary, the probabilities are that such an investigation would have led to the discovery of the truth.

Or, if Spencer, Vila & Co., before taking the stock certificates as collateral security, had been prudent enough to require a transfer to be made to them on the books of the corporation, this step would have brought them into contact with Quincy A. Shaw, and have exposed the whole attempted fraud. Some of the cases say that constructive notice is imputed only on the ground of gross negligence. But if it be so, a court of equity must hold it to be a want of ordinary prudence, or *crassa negligentia*, to omit all inquiry where there is actual notice that a trust of some kind exists, and the use proposed to be made of the trust property is *prima facie* a misappropriation.

The case of *Ashton v. Atlantic Bank*, 3 Allen 217, is not in conflict with these views. It does not proceed on the ground that there was no duty to inquire, but that upon inquiry and examination of the will creating the trust it would have appeared that the trustee might have the right to use the trust funds as he did. He raised money upon the stocks by a discount of his own note with them as collateral; and the court said that it might have been incident to his duties "to discount the trust funds for the sake of making a permanent investment," or "the purchaser might reasonably assume that the money was wanted to discharge liability incurred under the will. Such a case was well warranted by the will creating the trust." In short, the court came to the conclusion that the act of the trustee was in itself lawful in that particular case, and that his fraud consisted only in the misuse of the money when obtained. If this was true, of course the purchaser was not bound to see to the application of the purchase-money.

*Hutchins v. State Bank*, 12 Met. 421, was the case of a sale of shares of bank stock by an executrix. It is the established rule of equity that "purchases from executors of the personal property of their testator are ordinarily valid, notwithstanding it may be affected with some peculiar trust or equity in the hands of

the executor; for the purchaser cannot be presumed to know that the sale may not be required in order to discharge the debts of the testator to which they are legally liable before all other claims. But if the purchaser knows that the executor is converting the estate into money for an unlawful purpose, the purchase will be set aside:" Smith Manual Eq., tit. 1, c. iv. 10. "Where an executor disposes of or pledges his testator's assets in payment of, or as security for, a debt of his own, the person to whom they are disposed of or pledged will take them subject to the claims of creditors and legatees:" *Elliot v. Merryman*, 1 Lead. Cas. in Eq. 89; *Hill v. Simpson*, 7 Ves. 152. The same doctrine was held by Chancellor KENT, in 1823, in *Field v. Schieffelin*, 7 Johns. Ch. R. 150, who, upon a review of all the cases down to the time of that decision, thus sums up the result: "The great difficulty has been to determine how far the purchaser dealt at his peril when he knew from the very face of the proceeding that the executor was applying the assets to his own private purposes as the payment of his own debt. The later and the better doctrine is that in such a case he does buy at his peril." Chief Justice GIBSON, in *Petrie v. Clark*, 11 S. & R. 377, expressly announces the doctrine "that an executor's applying the assets in payment of his own debt is of itself a circumstance of suspicion which ought to put the purchasing creditor upon inquiry as to the propriety of the transaction."

The power of disposition over his testator's assets which an executor has, is as extensive as that of a trustee, and the conversion of the testator's personal estate into money is within the ordinary line of an executor's duty. Consequently the authorities which have been cited as to the liability of those dealing with executors are fully applicable to the case of one who takes trust property from a trustee as security for his private indebtedness.

We proceed to consider the testimony offered by the respondents and excluded by the judge at the hearing.

The fact that it is usual for dealers in stock to take certificates with blank transfers upon them and to fill them up with the names of purchasers, was wholly immaterial. Such a practice, as we have already observed, does not make the shares negotiable, and the purchaser whose name is written into the transfer must always derive his title immediately and solely from the stockholder of record. The point is not made by the complainant that a transfer in blank is out of the usual course of business, or a suspicious

circumstance, so that evidence of usage was not requisite to repel such an inference.

The fact that it is common to issue certificates of stock in the name of one as trustee when no trust actually exists, has no legal bearing on the decision of the present case.

The rules of law are presumed to be known by all men; and they must govern themselves accordingly. The law holds that the insertion of the word "trustee" after the name of a stockholder does indicate and give notice of a trust. No one is at liberty to disregard such notice and to abstain from inquiry for the reason that a trust is frequently simulated or pretended when it really does not exist. The whole force of this offer of evidence is addressed to the question whether the word "trustee" alone has any significance and does amount to notice of the existence of a trust.

But this has been heretofore decided, and is no longer an open question in this Commonwealth: *Sturtevant v. Jaques, ubi supra*.

The circumstance that stock certificates issued in the name of one as trustee and by him transferred in blank, are constantly bought and sold in the market without inquiry, is likewise unavailing. A usage to disregard one's legal duty, to be ignorant of a rule of law, and to act as if it did not exist, can have no standing in the courts.

It is to be borne in mind that the question under discussion is not whether one holding stock as trustee may sell it in the market and pass a good title to the purchaser. We do not intimate that this cannot be done. The distinction between a sale and a pledge of trust property is palpable and manifest. Nor is the present question whether a trustee may borrow money on the pledge of stock held in trust. We do not decide that such a transaction may not under some circumstances be sustained. These questions are left to be adjudged when they arise. The point now decided is that one holding stock as trustee has *prima facie* no right to pledge it to secure his own debt growing out of an independent transaction; and that whoever takes it as security for such a debt without inquiry, does so at his peril. All the proffers of evidence taken together fall short of showing any usage to do this: and no evidence of usage could legalize such conduct. Because Spencer, Vila & Co. took these certificates of stock to secure an antecedent debt from Mellen, Ward & Co. to them with notice that they were held in trust, and made no inquiry as to Carter's authority to use

trust property for such a purpose, they cannot retain the security against the equitable owner of the stock, when it appears that Carter in making the pledge was guilty of a fraudulent breach of trust.

The remaining questions relate to the effect of the payment on the 18th of March of the assessment of \$10,000 on this stock by Spencer, Vila & Co. to Q. A. Shaw, treasurer and transfer agent, in the presence of S. P. Shaw, the complainant. On the 2d of March, Spencer, Vila & Co. had received written notice from Q. A. Shaw that Carter had no right to transfer the stock to them, and that their title to it was contested. By receiving the money, which Spencer, Vila & Co. voluntarily offered to pay, the Messrs. Shaw did not induce them to change their position, or deprive them of any rights. They had taken the stock certificates nineteen days before they made the payment, and, when it was made, they had no reason to believe that either S. P. Shaw or Q. A. Shaw intended to abandon their claim, or to waive any of their rights. Q. A. Shaw could not have done so by any act of his own. S. P. Shaw did no act, and only omitted to object to the payment of the assessment. The payment was evidently the voluntary act of Spencer, Vila & Co., intended to fortify their own position, and to entitle them to a new certificate of the stock if their title should prove good. It was made for their own benefit and protection, and no act or declaration of the Messrs. Shaw deceived or misled, or induced them to make it. A waiver is an intentional relinquishment of a known right. An estoppel of the description relied on in this case can be maintained only on the ground that by the fault of one party another has been induced innocently and ignorantly to change his position for the worse in such a manner that it would operate as a virtual fraud upon him to allow the party by whom he has been misled to assert the right in controversy. These simple definitions of the terms "waiver" and "estoppel" exclude the possibility of applying either doctrine to the effect of the payment of this assessment.

The amount paid, with interest, must be refunded before any decree can be made requiring the respondents to retransfer the certificates to the complainant. As the bill contains no special prayer for this relief, and no offer to refund the money, it will require amendment before such a decree can be entered. But the injunction heretofore granted is made perpetual.

*United States Circuit Court, District of Wisconsin.*

JAY C. AKERLY v. LEVI B. VILAS AND OTHERS.

After a state court has made an order under the Act of Congress for the removal of a cause to a United States court, any further proceedings in the state court or in any other state court by appeal or other process, are void.

A state court making an order for the removal of a cause to a United States court, has no jurisdiction to allow an appeal from such order and to enjoin its clerk from certifying the record pending the appeal.

Where the clerk refuses under such an order to certify the record to the United States court, the latter will, on motion, allow the record and proceedings to be supplied by copies or affidavits, and the cause to proceed as if the record had been duly certified.

Where a state county court has given judgment which has been reversed by the Supreme Court of the state, and judgment entered in effect ordering a *venire de novo*, the cause has not reached final hearing or trial, and a motion to remove to a United States court is in time.

THE plaintiff, a citizen of New York, sued Vilas, a citizen of Wisconsin, and others, in the Circuit Court of Dane county. In October 1868, plaintiff asked the court, under the Act of Congress of March 2d 1867 (Statutes 1867, p. 558), to remove the cause to the Circuit Court of the United States, and on November 8th 1868 the court made an order to that effect, but gave the defendant leave to appeal from this order to the Supreme Court of the state, and enjoined its clerk from certifying the record pending such appeal. The clerk having refused to certify the record, the plaintiff now came into this court with affidavits of the facts and moved for an order allowing him to file in this court copies of the process, pleadings, and other proceedings in the cause, and that the cause might thereupon proceed as if regularly instituted in this court.

## Opinion by

MILLER, D. J.—This motion is made under the Act of March 2d 1833, § 4 (4 Stat. 634, Bright. Dig. tit. *Circuit Courts*, pl. 21), which enacts that “In any case in which any party is, or may be by law entitled to copies of the records and proceedings in any suit or prosecution in any state court to be used in any court of the United States, if the clerk of said court shall upon demand, and the payment or tender of the legal fees, refuse or neglect to deliver to such party certified copies of such record and proceed-

ings, the court of the United States in which such record and proceedings may be needed, on proof by affidavit, that the clerk of such court has refused or neglected to deliver copies thereof on demand as aforesaid, may direct and allow such record to be supplied by affidavit or otherwise, as the circumstances of the case may require or allow, and thereupon such proceeding, trial, and judgment may be had in the said court of the United States, and all such process awarded, as if certified copies of such records and proceedings had been regularly before the said court." The requirements of removal of causes from a court of a state to a court of the United States, according to the Act approved March 2d 1867, 14 Statutes 558, are, that a suit must be pending in the state court at the time of the application for removal, in which there is a controversy between a citizen of the state in which the suit is brought, and a citizen of another state, and the matter in dispute exceeds the sum of \$500 exclusive of costs, such citizen of another state, whether he be plaintiff or defendant, if he shall make and file in such court an affidavit stating that he has reason to, and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court, may at any time before the final hearing or trial of the suit file a petition in such state court for the removal of the suit into the next Circuit Court of the United States, to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court on the first day of its session copies of all process, pleadings, depositions, testimony, and other proceedings, &c. And it shall be thereupon the duty of the state court to accept the surety and proceed no further in the suit.

The Circuit Court of Dane county was satisfied that all the requirements of the act were complied with by plaintiff, and on inspection of the record found that there had not been a final trial or hearing of the suit. The court then accepted the surety offered, and ordered that all proceedings in the suit be stayed. In the 12th section of the Act of 1789, 1 Statutes 73 (Bright. Dig. tit. *Circuit Courts*, pl. 19), is the same provision in respect to the surety upon an application for the removal of causes from state to United States courts, "that it shall be the duty of the state court to accept the surety and proceed no further in the cause." The Supreme Court of the United States in *Gordon v. Longest*, 16 Peters 97, decided that when the application for the

removal of a cause is in proper form, and the facts on which the application is founded are made to appear according to the requirement of the act, the party is entitled to a right to have the cause removed under the law of the United States, and the judge of the state court has no discretion to withhold the right. And when on application for the removal, it is shown that the case is one embraced by the act, and that the party has complied with the required conditions, it is the duty of the state court to proceed no further in the cause," and every step further taken in the case, whether in the same court or in an appellate court, is *coram non judice*, and of course nugatory. See also *Kanouse v. Martin*, 15 Howard 198. Submitting to the authority of the Act of Congress and of the decisions of the Supreme Court of the United States, I have no other discretion than to decide that the clerk of the Circuit Court of Dane county was not justified in withholding the transcript from the plaintiff, either under the prohibition of the court, or by reason of the appeal after acceptance of the surety, and the order of removal of the cause to this court.

I will dispose of the remaining positions of the defendant's counsel as if upon a motion to remand the cause to the Dane Circuit Court.

It is objected that all the defendants are not citizens of the state of Wisconsin. Levi B. Vilas and Esther G. Vilas, his wife, are the principal party defendants. They are the parties to the mortgage in suit. It is alleged that Martin T. Vilas, one of the defendants, is a citizen of the state of Vermont, and is the owner of the equity of redemption of the mortgaged premises. Thomas Reynolds and Leonard J. Farwell, the remaining defendants, are citizens of this state. It is set out in the petition for removal that the persons named as defendants, except Levi B. Vilas and wife, have been either personally served with process issued in the cause, or have voluntarily entered their appearance, and that all the defendants except Levi B. Vilas have by the rules and practice of the court confessed and admitted the plaintiff's cause of action, by not answering the complaint of plaintiff, as required by law and rules and practice of the court. The state court finds that in this action now pending there is a controversy between Jay Camiah Akerly, plaintiff, and Levi B. Vilas, one of the defendants. From this it would seem that the allegation of the petition that the complaint had been taken as confessed against all the



defendants except Levi B. Vilas is correct. The service and appearance of those defendants may possibly require them to appear and answer a new bill to be brought in this court, or in default of an answer to let the bill be taken as confessed against them. But whether such be the practice or not I need not now determine. At the final hearing a question may be raised whether a decree can be made irrespective of these defendants. At present they do not appear to be necessary parties. See *Wood and Others v. Davis*, 18 Howard 457.

Another objection to the removal of the cause to this court is, that the application was not made "before the final hearing or trial in the state court."

- It appears from a report of the case in 21 Wisconsin Rep. 88, that the suit is for foreclosure of a mortgage given by Levi B. Vilas and wife to secure the payment of certain bonds. That the cause came on to be heard between the plaintiff and Vilas, the defendant, and a decree was rendered against the plaintiff, the court holding that the bonds and mortgage were invalid, from which decree the plaintiff appealed to the Supreme Court. And the defendant also appealed for alleged error of the court in striking out his counter claims and rejecting evidence in support of them. The Supreme Court decided that the bonds and mortgage were valid, and that one of the counter claims was improperly stricken out, and reversed the judgment of the Circuit Court on both appeals. The cause came on a second time to be tried before the Circuit Court, when a decree was rendered in favor of plaintiff, from which defendant Vilas appealed upon the ground of the rejection by the court of a certain counter claim set up in his answer. The Supreme Court reversed that judgment or decree, and remanded the cause to the Dane Circuit Court for further proceedings according to law. If the cause had been finally determined by either judgment of the Circuit Court, or by order of the Supreme Court, then the application for removal would not have been filed before "the final hearing or trial." But the last order of the Supreme Court reversing the judgment of the Circuit Court and remanding the cause to that court for further proceeding according to law, opened the whole case to litigation, the same as if no judgment had ever been rendered. The Supreme Court in effect ordered a *venire facias de novo*, which required the Circuit Court to hear the cause as if no hearing or trial had taken

place. The whole proceedings were *in fieri* when the petition for removal was presented to the Circuit Court. I am therefore of the opinion that the petition was presented before the final hearing or trial of the cause.

The motion of plaintiff is granted.

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*Superior Court of Massachusetts. Worcester.*

GEORGE W. SAWYER v. UNITED STATES CASUALTY COMPANY.

The words "totally disabled from the prosecution of his usual employment," in an accident insurance policy, mean *wholly disabled from doing substantially all kinds of his accustomed labor, to some extent*. A disability that prevents his doing as much in a day's work as before is not total, but one that entirely prevents his doing certain portions of his accustomed work is total, though there are other portions that he is able to do.

THIS was an action upon a policy of insurance against injury by accident, containing the following clause:—"If the said assured shall sustain any personal injury which shall not be fatal, but which shall absolutely and totally disable him from the prosecution of his usual employment, then, on satisfactory proof of such injury, compensation shall be paid him at the rate of ten dollars per week so long as he shall be totally disabled as aforesaid in consequence of such injury; provided, however, that, for any single accident, such compensation shall not be extended over a period exceeding twenty-six weeks."

The plaintiff claimed compensation for the full period, and the defendants denied his right to recover at all.

The plaintiff, who was a farmer, was in his barn unloading his wagon of corn in the stalk, and hanging the corn upon the beams. He was standing about fourteen feet from the floor upon a plank, which rested on the rounds of two ladders leaning against the hay piled in bays on each side of the barn floor. While reaching up to arrange the corn, one of the ladders slipped on the hay, and the plaintiff fell to the barn floor, striking his back against the corner of the wagon. For some days he suffered great pain, being confined to his bed for three days and to the house for about a week, and was unable to do any work for about a month,

though he could ride without inconvenience in an easy carriage. He then and constantly afterwards tried to do what he could of the farm work. He could milk a little and do some light work in the barn, but could not at any time that winter carry a pail of milk into the house; nor water nor take care of his cattle. He testified against the objection of the defendants, that after the twenty-six weeks had expired on March 6th 1868, he was unable to hold the plough or to mow for more than half an hour, and could not pitch hay, though he could rake a little. He could however drive a horse and do slowly and with difficulty light work which did not require lifting. From the time of his accident until the beginning of March, 1868, he kept an extra man, chiefly to do work about the house and barn which he testified he previously did himself and would otherwise have done himself. In the last part of November he, on one occasion, in the absence of his hired man, helped his boy to load a small horse wagon with light boards, but was obliged to sit down to rest once or twice during the loading, and to take nearly three hours in doing one hour's work. During January, he two or three times sat for an hour or two on a horse sled and drove a pair of horses breaking out roads, but all the work he did caused him pain, and, though before his accident he was accustomed to work hard and all day long with his men, he could not, for a period considerably longer than twenty-six weeks after the injury, do half-a-day's work at any time.

*Edwin H. Abbott*, for plaintiff, cited *Hooper v. The Accidental Death Insurance Company*, 5 Hurl. and Norm. 545, and asked the court to rule that if the plaintiff was wholly disabled from prosecuting his usual employment as he usually prosecuted it, and was wholly incapable of doing what he usually did before he was hurt, then he was absolutely and totally disabled, within the meaning of this policy, from the prosecution of his usual employment, and was entitled to recover compensation for the period during which he continued to be so disabled; and that whether or not the plaintiff could do some small portion of his usual work, was immaterial and did not affect his right to compensation for the time during which he was wholly incapable of doing his ordinary and usual work as he usually did it.

*Thomas H. Russell*, for defendant, asked the court to instruct the jury that if the plaintiff was able to go about his farm; to

ride; to superintend the work; to buy and sell; to drive a pair of horses in team breaking out roads in snow; and was able to transact generally the business of his farm or mill (if those were his usual employments), then he was not totally and absolutely disabled within the meaning of the policy.

REED, J., declined to give either instruction in the terms prayed for, and charged the jury that, if the plaintiff has met with such an accident as is described in the policy, he is entitled to recover, at the rate agreed on in the policy, for such time as by reason of such accident he is rendered wholly unable to do his accustomed labor; that is, to do substantially all kinds of his accustomed labor to some extent. When you find on an examination of the evidence that the plaintiff was able to do substantially all kinds of his accustomed work, though with less facility and to a less extent than before his injury, then his right to recover ceases. The mere fact that a man cannot do a whole day's work, or that by a day's work he cannot accomplish so much as before the accident, is not sufficient to entitle him to recover, but he must satisfy you that for a time, by reason of his accident, he is deprived of the power to do to any extent substantially all the kinds of labor which constitute his usual employments. For such time he can recover, and no longer.

For instance, if a farmer accustomed to perform all the kinds of labor usually done by farmers should meet with such an accident, and the result should be that he was left able only to milk his cows, but unable to do the other usual farm work, while that state of things continued he would be entitled to recover. So in case of a merchant; if his accident confined him to his house, although he might thus be able to make out his bills or post his books, yet, if he were unable to do the other work ordinarily done by merchants of his class, and such work as he was accustomed before to do, for such time he would be entitled to recover.

The phrase *substantially* all kinds of labor has been used in these instructions. By that such a case as this is intended to be covered: If you find that at a certain time the plaintiff was able to do all such work to some extent as he ordinarily was accustomed to do, then his right to recover ceases, although you may find he was still unable to perform some kinds of extraordinary labor which before the accident he sometimes did.

Thus, suppose a man occasionally did such a piece of work as digging a well or laying a stone wall, this not being his usual business; when you find that he could to some extent do all the usual work to which he was accustomed, his right to recover ceases, although you may find him unable to dig a well or lay a wall.

The jury found for the plaintiff.

## NOTES OF RECENT BANKRUPTCY DECISIONS.<sup>1</sup>

### I. JURISDICTION.

Where there is no conflict of jurisdiction between the officers of the state courts and Court of Bankruptcy, the latter will not interfere with its summary process to prevent such conflict: *Re Davidson*, East. Dist. N. Y., 2 B. R. 49.

*District of Bankrupt's carrying on Business.*—Where a bankrupt had been a member of a manufacturing firm in New Jersey, which failed and stopped business, and while continuing to reside in New Jersey, had an office in New York, where he received and wrote letters, and was settling up the business of the firm: *Held*, that he was not carrying on business in New York within the meaning of the statute, and discharge must be refused for want of jurisdiction: *Re Little*, So. Dist. N. Y., 2 B. R. 97.

*Injunction to stay Proceedings in another Court.*—A District Court has no power to grant an injunction to stay proceedings in another court by reason of bankruptcy proceedings pending in another state and before another court. Such power belongs to the court in which the proceedings are pending: *In re Richardson and Richardson*, So. Dist. N. Y., 2 B. R. 74.

*Discharge of Bankrupt from Arrest on Process from State Court.*—A judgment-creditor proved the debt in bankruptcy, which was shown by the record of proceedings in the state courts to have been created in fraud. The District Court refused to discharge the bankrupt from arrest and bail, and refused to direct satisfaction of the judgment. Petition to have decision of the District Court reviewed denied with costs: *Re Robinson*, So. Dist. N. Y. 2 B. R. 108.

*Bankrupt—Breach of Trust—Liability to Arrest.*—A bankrupt is not liable to arrest, pending proceedings in bankruptcy, upon a claim that would be discharged by an adjudication of bankruptcy. Where goods were sent to bankrupt to be sold on commission, and bankrupt, after selling, refused to account, *held*, that the debt being created by

<sup>1</sup> We are indebted for these notes to the Bankrupt Register.—EDS. AM. LAW REG.

defalcation of bankrupt while acting in a fiduciary relation was unaffected by discharge: *Re Kimball*, So. Dist. N. Y., 2 B. R. 74.

## II. ACTS OF BANKRUPTCY.

*Assignment by Insolvent.*—An assignment by an insolvent of all his property for the benefit of preferred creditors is an act of bankruptcy. Where property of an insolvent was assigned to creditors with fraudulent preference, *Held*, in an action brought by assignee in bankruptcy to recover said property, that the value of property exempt from execution must be deducted, and judgment entered up for remainder: *Grou v. Ballard*, Dist. of California, 2 B. R. 69.

*Suspension of Payment.*—Suspension of payment of commercial paper fourteen days by a merchant, is *prima facie* evidence of fraud, and casts the burden of proof on the alleged bankrupt; and being unexplained, decree of bankruptcy adjudged on petition of creditors: *Re Ballard & Parsons*, Dist. of Connecticut, 2 B. R. 84.

The non-payment at maturity of promissory notes that are not commercial paper, is no ground for an adjudication of the debtors as bankrupts on a petition by a creditor in involuntary bankruptcy: *Re Lowenstein*, So. Dist. N. Y., 2 B. R. 99.

## III. EFFECT OF THE INSTITUTION OF PROCEEDINGS.

*Property of Bankrupt after Petition filed.*—The property of bankrupt after filing his petition is not liable to be taken on execution, and the court will prevent such interference by injunction. Proceedings in bankruptcy are in the nature of equity proceedings: *Re Wallace*, Dist. of Oregon, 2 B. R. 52.

*Exempted Property.*—Property of the bankrupt, exempt both by the state law and Bankrupt Law from levy and sale, cannot be sold after he has filed his petition in bankruptcy, although then levied on by United States marshal: *Re Griffin*, So. Dist. Georgia, 2 B. R. 85.

*Attachment in State Court—Lien of Attaching Creditor.*—Where an attachment is dissolved by the commencement of proceedings in bankruptcy, the title of the property attached vests in the assignee, but subject to all subsisting liens then existing on the property. Where the proceedings of the sheriff under an attachment up to the commencement of proceedings in bankruptcy were regular and valid, he has a lien on the property for his fees which accrued prior to such commencement, but to no greater extent: *Re Housberger and Zibelin*, So. Dist. N. Y., 2 B. R. 33.

*Lien Creditor.*—A vendor's equitable lien will be upheld by Court of Bankruptcy: *Re Pardue*, Nor. Dist. Georgia, 2 B. R. 67.

*Levy by Judgment-Creditors—Lien protected.*—Creditors holding judgment may order execution to issue and levy upon and sell the property of their debtor, and the Bankrupt Law will protect them in the advantage thus secured, although they may have had, at the time of ordering the execution, doubts as to the solvency of the debtor: *Re Kerr*, West. Dist. Mo., 2 B. R. 124.

*Powers of Bankrupt.*—Bankrupts, before the appointment of the assignee, stand in a fiduciary relation to the estate, and cannot be purchasers: *March v. Heaton*, Dist. of Mass., 2 B. R. 66.

*Feme Covert.*—A feme covert engaging in trade must do so in accordance with the statute of the state. Not having done so, and being incapacitated to make contracts, she may avail herself of her coverture to defeat debts in bankruptcy: *Re Slichter*, Dist. of Minnesota, 2 B. R. 107.

*Debt of Petitioning Creditor.*—While an adjudication in bankruptcy stands unrevoked, all inquiry into the validity of the debt of the petitioning creditor in the involuntary proceedings is precluded: *Re Fallon*, So. Dist. N. Y., 2 B. R. 92.

#### IV. PRACTICE.

*Original Papers—Leave to Withdraw.*—Original papers referred to in bankrupt's deposition, and annexed thereto, cannot be withdrawn from the files at the option of the bankrupt. The court may order a withdrawal for good reason shown by party interested: *Re McNair*, Dist. of North Carolina, 2 B. R. 109.

*Creditor asking to be paid should do so by Petition.*—A creditor may petition the court for relief, to be paid a judgment against the bankrupt, out of moneys in the hands of the assignee in bankruptcy, but the proper way to bring the creditor into the case is by petition, and not by motion: *Re Smith*, So. Dist. N. Y., 2 B. R. 98.

*Omission to publish Notice of Meeting.*—An omission to publish notice of the first meeting of creditors to prove their debts in one of the papers designated for that purpose, also a failure to state in the warrant the names, residences, and amounts of the debts of creditors, and the false return of messenger, are sufficient irregularities to set aside the proceedings before had: *Re Hall*, Nor. Dist. N. Y., 2 B. R. 68.

*Partnership—Petition of one Partner to adjudicate the Firm Bankrupt.*—Two or more partners may be adjudged bankrupts upon the petition of one or more of them. A mere formal dissolution of the partnership while there are assets, &c., will not prevent the operation of the act upon the partners, either in a voluntary or involuntary case. A suit brought for fraudulently recommending a person as worthy of trust and confidence, is not a claim within the 14th section of the act which passes as assets to the assignee: *Re Crockett and others*, So. Dist. N. Y., 2 B. R. 75.

#### V. EXAMINATION OF BANKRUPT.

*Application by Assignee.*—It is not necessary that the application of assignee for the appearance of bankrupt should be under oath. A bankrupt may be called upon at any time to submit to an examination, and as the assignee is a *quasi* officer of the court, it is only necessary that the court should be satisfied of the *bonâ fides* of his application: *Re McBrien*, So. Dist. N. Y., 2 B. R. 73.

*When Order made by Court.*—Order for examination of bankrupt always made by court on petition for final discharge. Any other exami-

nation must be ordered on petition of assignee or creditors: *Re Brandt*, Dist. of North Carolina, 2 B. R. 109.

*Application by Creditor.*—A creditor to obtain an order according to Form 45 for an examination of the bankrupt under sect. 26, must apply for such order by petition or affidavit, and show good cause for granting the same: *Re Adams*, So. Dist. N. Y., 2 B. R. 83.

*Regulation of.*—Each creditor has the right to examine the bankrupt under section 26 of the act, but such examinations are to be regulated as to time, manner, and course by the register in the exercise of a sound discretion: *Re Adams*, So. Dist. N. Y., 2 B. R. 92.

*Questions to Bankrupt.*—A bankrupt must answer questions in relation to property in which it is shown that he might possibly have an interest: *Re Bonesteel*, So. Dist. N. Y., 2 B. R. 106.

## VI. OF THE DISCHARGE.

*Application for, within One Year.*—Bankrupt must make application for discharge within one year from the date of adjudication in bankruptcy: *Re Willmott*, Nor. Dist. N. Y., 2 B. R. 76.

Under section 29, it is only in cases where the bankrupt can apply for his discharge within less than six months from his adjudication that he must do so within a year therefrom in order to obtain a discharge: *Re Greenfield*, So. Dist. N. Y., 2 B. R. 100.

*Omission of Creditor's Name from Schedule.*—The omission of the names of creditors on the schedule, with the knowledge and consent of those creditors, is not such a wilful and fraudulent omission as to prevent a discharge of the bankrupt, upon the objection of other creditors: *Re Needham*, Dist. of Mass., 2 B. R. 124.

*False Oath as to Assets.*—Where the wife of the bankrupt had with her own money bought out the interest of a retiring member of an insurance broker's firm, which employed the bankrupt ostensibly as clerk, at a percentage of profits in lieu of salary, and the shares of the wife and the bankrupt did not exceed the fair remuneration of the bankrupt for his services to the firm, which he was mainly instrumental in building up and conducting, and the annual profits whereof were \$35,000.

*Held*, that the bankrupt was virtually a partner, and swore falsely that he had no assets. Discharge refused: *Re Rathbone*, So. Dist. N. Y., 2 B. R. 89.

*Concealment of Effects.*—Where a specification in opposition to the discharge of a bankrupt is that the bankrupt has concealed his effects, or that he has sworn falsely in his affidavit annexed to his inventory of debts, it must be shown that the acts were intentional in order to preclude a discharge: *Re Wyatt*, Dist. of Kentucky, 2 B. R. 94.

*Concealment of Property.*—Where specifications in opposition to the discharge of the bankrupt set forth that he had concealed property in the hands of his brother, from which badges and indicia of fraud were deduced, and not overborne by the positive testimony: *Held*, that the specifications were sustained, and discharge refused: *Re Goodridge*, So. Dist. N. Y., 2 B. R. 105.



*Fraudulent Debt.*—A fraudulent debt must be one made with a view to give a preference. Payment of attorney's fees is not such a preference as will prevent discharge of bankrupt: *Re Sidle*, So. Dist. Ohio, 2 B. R. 77.

*Fraudulent Preference.*—An assignment of a claim to secure a pre-existing indebtedness made when the bankrupt was insolvent, and not as a pledge of security, made at the time the indebtedness was contracted and as a part of the transaction, is a fraudulent preference and a good ground for refusing a discharge: *Re Foster*, So. Dist. N. Y., 2 B. R. 81.

Where a person subject to the bankrupt law, being insolvent, and knowing himself to be such, but not contemplating bankruptcy, pays one creditor in full, there is no conclusive presumption that he has given a fraudulent preference within the meaning of section 29 of the Bankrupt Act, so as to prevent his discharge, although such payment may be an act of bankruptcy within the meaning of section 39 of the act: *Re Locke*, Dist. of Massachusetts, 2 B. R. 123.

Section 29 refuses a discharge on the ground of preference only when the act is brought within the definition of section 35, or of section 29 itself. Under the latter, it must be proved that bankruptcy was in contemplation, and under the former that the creditor was a party to the fraud: *Id.*

*Assignment for benefit of Creditors in contemplation of Bankruptcy.*—Where it appeared solely from the testimony of bankrupt that he had made a general assignment for benefit of creditors, and filed an application in bankruptcy on the fourth succeeding day: *Held*, that a bare denial of the bankrupt is insufficient to show that such transfer was not made in contemplation of bankruptcy. Application for a discharge denied: *Re Brodhead*, East. Dist. N. Y., 2 B. R. 93.

*Books of Account of Merchant.*—The provision that no discharge shall be granted, if the bankrupt, being a merchant or tradesman, has not subsequently to the passage of the act kept proper books of account, applies, whether the omission to keep them has been with fraudulent intent or not: *Re Solomon*, East. Dist. Pa., 2 B. R. 94.

It is not necessary that the omission of a bankrupt to keep proper books of account should be wilful in order to prevent a discharge. The intent of non-keeping of books is immaterial: *Re Newman*, So. Dist. N. Y., 2 B. R. 99.

What are proper books of account in any case must be determined by the facts and circumstances of the particular case: *Id.*

*Vague Specifications of Fraud.*—Vague and general specifications, reciting fraud, &c., will not be allowed in opposition to discharge: *Re Tyrrel*, So. Dist. N. Y., 2 B. R. 73; *Re Hansen*, *Id.* 75; *Re Dreyer*, *Id.* 76.

*Fraudulent Debt.*—Opposition to discharge, grounded upon the fact of debt being fraudulently created, is insufficient: *Re Doody*, So. Dist. N. Y., 2 B. R. 74.

*Debt created while in Fiduciary Character.*—On a specification in opposition to a discharge setting forth that a debt due by bankrupts was created while they were acting in a fiduciary character: *Held*, that the fact was no ground for withholding discharge: *Re Tracy and others*, So. Dist. N. Y., 2 B. R. 98.

*Filing of Specification in Time.*—A creditor as assignee of a note of the bankrupt secured by a deed of trust on land, cannot come in and oppose discharge of the bankrupt unless he shall have entered his opposition and filed his specifications within the proper time and according to rule: *Re Mc Vey*, Dist. of Mississippi, 2 B. R. 85.

*Specifications in Opposition filed nunc pro tunc.*—In a proper case, where the omission to file specifications in opposition to the discharge within ten days after the return day to show cause was inadvertent, creditors may file same with permission, *nunc pro tunc*: *Re Grefe*, So. Dist. N. Y., 2 B. R. 106.

*Creditors who have not proved.*—Creditors who have not proved their debts can oppose discharge of bankrupt: *Re Boutelle*, Dist. of N. H., 2 B. R. 51.

*Certificate of Register as to Bankrupt's Oath.*—The register is to certify conformity, or non-conformity on presentation to him by the bankrupt of the oath required by section 29, and where there be specifications in opposition to the discharge, the register may certify conformity except in the particulars covered by the specifications: *Re Fuller*, So. Dist. N. Y., 2 B. R. 101.

## VII. RIGHTS AND DUTIES OF ASSIGNEE.

*Choice of.*—Where an assignee is chosen by the greater part in value and number of the creditors who have proved their claims, and there is no imputation either upon his capacity or integrity, he is assigned by virtue of law, and the judge is not competent to interfere. *Re Grant*, Dist. of So. Car., 2 B. R. 35.

*Should not solicit Votes for his Appointment.*—The court will not sanction the solicitation of votes of creditors by persons seeking thereby to be chosen assignees: *Re ———*, So. Dist. N. Y., 2 B. R. 100.

*Conveyance by Register to Assignee.*—Register has the right to convey the estate to the assignee when there is "no opposing interest," although the title to the property is in dispute: *In re Wylie*, Dist. of Maryland, 2 B. R. 53.

*Suit for Property fraudulently disposed of by Bankrupt.*—Property fraudulently disposed of by bankrupt in proceedings by or against him may be recovered by the assignee upon petition in the Bankruptcy Court, proceedings upon which may be of a summary character.

The district judge may order issues of fact arising in such cases to be tried by a jury.

Suits may be brought at common law, or by bill in equity, for the recovery of property in such cases, but as they must be governed by technical rules, and be subject to the delays incident thereto, it is preferable to proceed by summary proceedings in the Court of Bankruptcy,

that being a cheaper, speedier, and more simple mode: *Neall v. Beckwith and others*, Nor. Dist. Ohio, 2 B. R. 82.

*Suit for Property conveyed by Bankrupt within four months.*—In an action of trover brought by an assignee in bankruptcy against a creditor to recover the value of certain property transferred by the bankrupt to the creditor within four months preceding the adjudication of bankruptcy, it not being shown that a preference of creditors, or a fraud on the act, was thereby intended. *Held*, that the assignee could not recover: *Wadsworth v. Tyler*, Dist. of Connecticut, 2 B. R. 101.

*Suit to recover Payments made to Mortgage-Creditor.*—A chattel-mortgage of a stock of goods executed by one copartner under seal, and assented to by the other partner by parol, is valid, and is not invalidated by the fact that such mortgages are not required by law to be under seal: *Hawkins v. Bank*, Dist. of Minnesota, 2 B. R. 108.

Where mortgagors in such a mortgage had stipulated to retain possession of goods to sell and dispose of them as agents of the mortgagee, a national bank: *Held*, in an action brought by the assignee in bankruptcy to set the mortgage aside and recover the amount of deposits made by the mortgagor with the mortgagee, that the mortgage-debt would be extinguished by sales and deposits with the mortgagee, by the mortgagors in possession, and no recovery could be had: *Id.*

#### VIII. PROOF OF DEBT.

*Creditor, with Security.*—A creditor of a bankrupt holding the security of a deed of trust in the nature of a mortgage, with a power of sale in a third party as trustee, must prove his debt as a creditor holding a security, and obtain the permission of the court to have the security sold. If he direct a sale without this permission, the court, upon application of the assignee, will set aside the sale: *Re Bittel and Others*, East. Dist. Mo., 2 B. R. 125.

If the trustee sell without the authority of the court, whether any title pass to the purchaser, *quære*: *Id.*

*Fraudulent Debt.*—A debt created by fraud is provable. Where amount due to a creditor is in dispute in a state court, the Court of Bankruptcy may allow the suit to proceed: *Re Rundle and Jones*, So. Dist. N. Y., 2 B. R. 49.

*Judgment for Breach of Promise of Marriage.*—A judgment obtained on breach of promise to marry is a debt provable in bankruptcy and is barred by discharge. Concealment to oppose discharge of bankrupt must be wilful: *Re Sille*, So. Dist. Ohio, 2 B. R. 77.

*Judgment after Adjudication.*—A judgment extinguishes the debt upon which it was founded and constitutes a new debt. A judgment obtained after an adjudication of bankruptcy is not provable against estate of bankrupt: *Re Williams*, Dist. of Connecticut, 2 B. R. 79.

*Action to Recover may be stayed.*—An action to recover a provable debt is to be stayed until a determination is had as to the discharge, whether the debt be one that will be discharged or one that will not: *Re Rosenberg*, So. Dist. N. Y., 2 B. R. 81.

## IX. DISTRIBUTION.

*Jurisdiction of State Courts.*—The distribution of the assets of a bankrupt cannot be interfered with by process of state court. Money awarded under a rule of court cannot be attached: *Re Bridgman*, So. Dist. Georgia, 2 B. R. 84.

*Partnership Debts.*—A creditor, the obligee of a joint and several bond given by the members of a copartnership, is entitled to dividends out of the several assets of the individual bankrupts, members of the firm, the firm and its several members having been adjudicated bankrupt: *Re Bigelow and Others*, So. Dist. N. Y., 2 B. R. 121.

## X. COSTS.

*Bankrupt as Witness.*—A bankrupt summoned by creditor to appear as witness is not entitled to witness fees: *Re McNair*, Dist. Nor. Car., 2 B. R. 77.

The party for whom services are performed by the officers of the court must pay the fees incident to such services. A creditor is only bound to pay expenses of his own examination. Bankrupt making further statements after creditor's examination is closed, must pay his own expenses: *Re Mealy*, Nor. Dist. N. Y., 2 B. R. 51.

*United States Marshal as Messenger.*—Travel by a United States marshal as messenger to make return on warrant of bankruptcy is necessary, and mileage of five cents per mile therefor is a proper charge.

A charge by marshal of ten cents per folio for preparing notices to creditors is an improper charge.

An item for attendance is an improper charge: *Re Talbot*, So. Dist. Georgia, 2 B. R. 93.

## XI. REGISTER.

*Powers of.*—A register has power to fill up blank, issue summons, &c., the same as judge. The register has no right to summon witnesses for the purpose of eliciting the facts on which to base an exception. A register has the power to call bankrupt before him to answer matters touching property, his discharge, &c. A register may proceed the same as the judge when there is no controversy: *Re Brandt*, Dist. of Nor. Car., 2 B. R. 76.

*Power to order Payment of Fees.*—The register has power to order the payment of fees and expenses incurred in a case out of assets in the hand of the assignee, on application of the attorney for the bankrupt: *Re Lane*, So. Dist. N. Y., 2 B. R. 100.

*Control over Proceedings.*—In questions of postponement, and of cases of adjournments before registers, they must exercise proper legal discretion. Subject to this rule, they have entire legal control of cases before them, and must exercise their best judgment in preventing unnecessary and unreasonable delays: *Re Hyman*, So. Dist. N. Y., 2 B. R. 107.

## ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.<sup>1</sup>COURT OF APPEALS OF MARYLAND.<sup>2</sup>COURT OF CHANCERY OF NEW JERSEY.<sup>3</sup>

## AGENT.

*Notice of his Authority.*—A party dealing with an agent for a special purpose must ascertain at his own peril the agent's power. And where an agent's contract to sell land at a fixed price has been approved by the principal, the purchaser has no right to infer from that fact that the agent has power to alter the terms of the contract: *The National Iron Armor Company v. Bruner*, 4 C. E. Green.

An agent with restricted power to sell a tract of land at a given price, has no power to bind his principal by any representation as to the quantity or quality of the land. Such representations, if false, may avoid the contract: *Id*

## ARBITRATION AND AWARD.

*Government Claims.*—An Act of Congress referring a claim against the government to an officer of one of the executive departments to examine and adjust, does not, even though the claimant and government act under the statute and the account is examined and adjusted, make the case one of arbitrament and award in the technical sense of these words, and so as to bind either party as by submission to award: *Gordon v. United States*, 7 Wall.

Hence, a subsequent act repealing the one making the reference (the claim not being yet paid) impairs no right and is valid. *DeGroot v. United States*, 5 Wall. 432, affirmed: *Id*.

*Semble*, that the court does not sanction the allowance of interest on claims against the government: *Id*.

## ATTORNEY.

*Privileged Communication.*—An agreement made in the presence of an attorney between his client and a third person, is not a privileged communication: *Carr v. Weld*, 4 C. E. Green.

## CHARITABLE USES.

*Object of the Statute.*—The object of the statute of charitable uses in England was not to restrain gifts to such uses, but to enforce and make valid such gifts in certain cases in which they had before been held void because the object was too vague and indefinite: *Norris et al. v. Thomson's Ex'rs. et al.*, 4 C. E. Green.

The statute of charitable uses has never been enacted in this state.

<sup>1</sup> From J. W. Wallace, Esq., Reporter; to appear in 7 Wall. Rep.

<sup>2</sup> From J. S. Stockett, Esq., Reporter; to appear in 28 Md. Rep.

<sup>3</sup> From C. E. Green, Esq., Reporter; to appear in 4 C. E. Green's Rep.

and therefore English decisions founded upon its provisions may not be of authority here, but such as declare gifts void on account of the objects being too vague and indefinite upon principles adopted as part of the common law before the statute, should be regarded: *Id.*

A power of appointment given to one by a will to give or devise certain property among such benevolent, religious, or charitable institutions as he may think proper, is void because so vague and indefinite that it cannot be enforced. And the defect in this case would not be aided in England by the statute of charitable uses: *Id.*

Where a power to dispose of property is conferred upon a person to whom a life estate or some other interest in it is given, this is a power in gross and can be relinquished or surrendered, but where such power is given to one who has no interest in the property it is a power simply collateral and cannot be surrendered: *Id.*

An act of the legislature which in a particular case authorizes the surrender of such power when simply collateral, or confirms such surrender when made, is constitutional and valid; it divests or takes away no vested or settled rights: *Id.*

*Change in Name and other Particulars of Corporation Trustee.*—Where a testator devises the income of property in trust primarily for one object, and if the income is greater than that object needs, the surplus to others (secondary ones), a bill in the nature of a bill *quia timet*, and in anticipation of an incapacity in the trusts to be executed hereafter, and when a surplus arises (there being no surplus now, nor the prospect of any), will not lie by heirs at law (supposing them otherwise entitled, which here they were decided not to be), to have this surplus appropriated to them on the ground of the secondary trusts having, subsequently to the testator's death, become incapable of execution: *Girard v. Philadelphia*, 7 Wall.

Neither the identity of a municipal corporation, nor its right to hold property devised by it, is destroyed by a change of its name, an enlargement of its area, or an increase in the number of its corporators. And these are changes which the legislature has power to make: *Id.*

*Ex. gr.:* A city having the name of "The Mayor, Aldermen, and Citizens of Philadelphia," covered two square miles, was surrounded by twenty-eight incorporated municipalities, more populous than itself, and which, with it, covered a hundred and twenty-nine miles square, and made the county of Philadelphia. An Act of Assembly enacted that the name above given should be changed to "The City of Philadelphia," and the boundaries of the said city extended so as embrace the whole territory of the county, and that all the powers of the said corporation, as enlarged and modified by the act, should be exercised and have effect within the said county, and over the inhabitants thereof. The act also consolidated the aggregated debt of all the corporations and made it the debt of the new city, and largely extended and changed the organization of the old city.

*Held*, that the original corporation was not destroyed, and (the consolidating act having declared that all the estates held by any of the corporations affected by the act should be held "upon and for the same uses, trusts, limitations, charities, and conditions as the same were then held") that the new city had every capacity to take and hold, and every power to execute trusts which were possessed by the old one: *Id.*

Under the will of Stephen Girard (for the terms of which see the case in full in 7 Wallace) the whole final residuary part of his estate was left to the old city of Philadelphia, in trust, to apply the income:—

i. For the maintenance and improvement of his college as a primary object, and after that to enable the corporation,

ii. To improve its police.

iii. To improve the city property and the general appearance of the city, and to diminish the burden of taxation.

The court having declared that so long as any portion of the income should be found necessary for improvement and maintenance of the college, the second and third objects could claim nothing, and the whole income being, in fact, necessary for the college:—

*Held*—i. That no question arose at this time as to whether the new city should apply the surplus under the trusts for the secondary objects to the benefit of the new city, or to that portion of it alone embraced in the limits of the old one.

ii. That whether or not the trusts being, as was decided in *Vidal v. Girard*, 2 Howard 127, in themselves valid, Girard's heirs could not inquire or contest the right of the city corporation to take the property or to execute the trust; this right belonging to the state alone as *parens patriæ*: *Id.*

#### CONFLICT OF LAWS. See *Corporation*.

*Law of Domicil and of Situs*.—A., B., and C., were residents and citizens of New York. A. being indebted to both B. and C., and having certain chattels personal in Illinois, mortgaged them to B. Two days afterwards, and before the mortgage could be recorded in Illinois, or the property be delivered there—both record and delivery being necessary by the laws of Illinois, though *not* by those of New York, to the validity of the mortgage as against third parties—C. issued an attachment, a proceeding *in rem*, out of one of the courts of Illinois, and, under its laws, in due form, levied on and sold the property. B. did not make himself a party to this suit in attachment, though he had notice of it, and, by the laws of Illinois, a right to take defence to it; but after its termination, brought suit in New York against C. for taking and converting the chattels. C. pleaded in bar the proceedings in attachment in Illinois. The New York courts—holding that the only question was B.'s property in the chattels on the day of the attachment; that the existence or non-existence of such property was to be decided by the law of the domicil of the parties, to wit, New York; and finally that by this law the property was complete in B. on the execution of the mortgage—adjudged, that the proceedings in attachment in Illinois were not a bar. But,

*Held*, by this court, that by such judgment the “full faith and credit” required by the Federal Constitution had not been given in the state of New York to the judicial proceedings of the state of Illinois: and that so the judgment below was erroneous: *Green v. Van Buskirk*, 7 Wall.

The fiction of law that the domicil of the owner draws to it his personal estate wherever it may happen to be, yields whenever, for the purposes of justice, the actual *situs* of the property should be examined: *Id.*

By the laws of Illinois an attachment on personal property there, will

take precedence of an unrecorded mortgage executed in another state where record is not necessary, though both the owner of the chattels, the attaching creditor, and the mortgage creditor are residents of such other state: *Id.*

CONSTITUTIONAL LAW. See *Conflict of Laws*.

*Right to sue in United States Courts.*—The constitutional right of citizens of one state to sue, in the Federal courts, citizens of another (within which right comes that of citizens of one state to sue a municipal corporation chartered by another and where the corporators are all citizens of that other) cannot be defeated by statutory limitation: *Cowles v. Mercer Co.*, 7 Wall.

CORPORATION.

*Lex loci contractus*—*The rule of Comity*—*How Foreign Laws are to be proved.*—A corporation can have no legal existence, out of the boundaries of the sovereignty by which it is created. It exists by force of the law; and where that ceases to operate and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But while it must live and have its being in that state only, there is no insuperable objection to its power of contracting in another. Being an artificial person, it may, like natural persons, through the intervention of agents, make contracts within the scope of its limited powers in a state where it does not reside; provided such contracts are permitted to be made by the laws of the place: *B. and O. Railroad Co. v. Glenn*, 28 Md.

Corporations, unlike natural persons, cannot change their domicile; they have a stationary habitation, and can only have transactions away from their home through their agents: *Id.*

Where a corporation derives its charter from the state of Virginia alone, its domicile is in that state exclusively. It cannot reside here and in Virginia at the same time under the one charter: *Id.*

The validity of a deed made by a corporation created by the laws of Virginia, must be determined by the laws of that state; if it be legal there it is so here, unless it violates good morals, or is repugnant to some law or policy of this state. If it be fraudulent and void according to the laws of Virginia, the fraud attaches to it here, and vitiates it: *Id.*

It is a general principle, admitting of few exceptions, that in construing contracts made in a foreign country, the courts are governed by the *lex loci*, as to the essence of the contract; that is, the rights acquired and the obligations created by it: *Id.*

The rule of comity adopts the law of the country where the contract is made, in determining its nature, construction, and validity, unless such construction is *contra bonos mores*, or against some positive law of the place where the contract is sought to be enforced: *Id.*

No right can be derived under any contract made in express opposition to the laws of the place in which such contract is made: *Id.*

An assignment of personal property within our limits belonging to parties abroad, may be made according to the foreign law, where our own citizens, in assigning similar property, are required to conform to our laws regulating such assignment: *Id.*

The unwritten law of a foreign country is a fact to be proved, as



other facts, by the testimony of experts; the statutory law, by the law itself, or an exemplified copy: *Id.*

#### COURTS.

*Statutory Jurisdiction—Judicial Sales when called in question collaterally.*—Where special and extraordinary powers are given by statute to a court in relation to a subject-matter, of which such court had no jurisdiction independent of the statute, all the requisites of the statute must be strictly complied with, to render the exercise of the powers so given valid: *Cockey v. Cole*, 28 Md.

Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or not, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought in opposition to them, even prior to a reversal: *Id.*

Sales ratified by a court having jurisdiction, when collaterally called in question, should be upheld by every legal intendment. And if errors and irregularities exist, they are to be corrected by some direct proceeding, either before the same or an appellate court: *Id.*

COURT OF CLAIMS. See *Revenue Laws*.

#### DEBTOR AND CREDITOR.

*Wearing Apparel.*—A lace shawl is wearing apparel and exempt from execution. Whether it is of greater value than the owner ought to wear in her condition in life as to property, cannot be inquired into, where it was bought for her use before judgment or claim against her: *Frazier and Wife v. Barnum*, 4 C. E. Green.

Rings and jewelry are not wearing apparel and are liable for debt, and as it may be out of the power of the sheriff to levy on or take possession of them, being usually worn on the person, a receiver will be appointed and an order made for their delivery to him: *Id.*

An assignment of an annuity, though due from parties and properties out of the jurisdiction of this court, made by the person to whom it belongs to a receiver here under the direction of this court, is good, and would enable the receiver to collect it in a foreign state. But where the fund held in trust for the debtor has proceeded from some person other than the debtor himself, it is exempt: *Id.*

*Fraudulent Sale.*—A sale, far below value, of a railroad with its franchises, rolling-stock, &c., under a decree of foreclosure, set aside as fraudulent against creditors; the sale having been made under a scheme between the directors of the road and the purchasers, by which the directors escaped liability on endorsements which they had made for the railroad company. And the purchasers held to be trustees to the creditors' complainant, for the full value of the property purchased, less a sum which the purchasers had actually paid for a large lien claim presented as for its apparent amount, but which they had bought at a large discount. Interest on the balance from the day of purchase to the day of final decree in the suit to be added: *Drury v. Cross*, 7 Wall.

But because the full value of the property sold was not shown with sufficient certainty, the case was sent back for ascertainment of it by a master: *Id.*

#### EASEMENT.

*Title by Time—Mill-Dam.*—The courts of this state have, by analogy to the statute relating to title to other real property, adopted twenty years as the term for acquiring an easement by enjoyment. The adverse enjoyment must have been continuous and to the full extent for the whole of the time: *Carlisle and Others v. Cooper*, 4 C. E. Green.

In case of a dam, the easement acquired is not the right of maintaining a dam or structure upon the land of the party himself, but the right to flow back the water on the land of his neighbor. His neighbor has no right of action for the mere building of the dam, unless it throws the water back upon his land; his suffering it is no acquiescence in anything from which a grant or permission can be presumed: *Id.*

No one is bound to measure the dam of an adjoining proprietor, and employ an engineer to calculate whether, if kept tight and full, it will throw water upon him. But when it does throw water upon him, if he permits it for twenty years a grant will be presumed. But this only to the extent to which his land was habitually or usually overflowed: *Id.*

The rule is that any interruption of enjoyment during the acquisition of an easement that is within the twenty years, will defeat the acquisition. After the acquisition is complete, no interruption or cessation, except for twenty years, or with a plain intention to abandon, will destroy the easement: *Id.*

Where the dam is a permanent structure, it is not necessary that the water should be kept constantly in it to its full capacity, nor that it should be always kept in perfect repair; it is the height of the water as ordinarily kept in the dam, when kept in repair as dams are kept for profitable and economical use, that will fix the height acquired by prescription. If a dam is permitted for one or more years to be out of repair so as not to injure the land above it, that time will not be counted in the prescription; the prescription is interrupted and must commence anew: *Id.*

This rule must apply only to such dams as are permanent, and to such gates and movable parts as are constantly used and kept in their places to raise the height of the water. Boards or gates that are only used in seasons of low water, so as to increase the water in a mill-pond, without overflowing the lands above, and used at intervals only, cannot gain the right to keep the dam at the height to which they raise it, if that will make the level of the water upon the lands of the upper proprietor higher than maintained for twenty years: *Id.*

When an easement to flow water is claimed by adverse enjoyment the whole burden of proof is on the claimant: *Id.*

#### EQUITY.

*Sales under a Decree—Vacation of Sales—Substitution of Purchaser.*—A sale under a decree of a court of equity should not be vacated and set aside for causes that the parties interested might, with reasonable diligence and effort, have obviated. Every intentment will be made to support such a sale; and it is only where the court can see

that injustice will be done by the ratification of a sale, to a party not in default, that it will interfere to prevent it: *Farmers' Bank of Maryland v. Clarke*, 28 Md.

A sale *bonâ fide* made, will not be set aside because of a diversity of opinion among witnesses as to the value of the property, unless it appear that the price reported is so grossly inadequate, as to do injury to parties not in default: *Id.*

The ratification or rejection of a sale under a decree in equity, must depend on the state of facts existing at its date, and not on subsequent events. As the purchaser is made to bear all loss by depreciation subsequent to the time of sale, he should be entitled to all profit that he may be able to make of the property after that time: *Id.*

A court of equity will allow the substitution of one person in place of another, as purchaser of property, sold under its decree, having a proper regard to his ability to comply with the terms of sale: *Id.*

#### FRAUD. See *Debtor and Creditor*.

*Fraud by two Parties—Evidence.*—In an action against two defendants for fraudulently obtaining the property of the plaintiff, the declaration alleged that the fraud was a matter of pre-arrangement between them. The fraud of one of the defendants was not contested, and as to the other defendant, *Held*, that his subsequent participation in the fraud and its fruits was as effective to charge him as preconcert and combination for its execution. Every act of each in furtherance of the common design was in contemplation of law the act of both: *Lincoln v. Claflin et al.*, 7 Wall.

Where fraud in the purchase or sale of property is in issue, evidence of other frauds of like character committed by the same parties, at or near the same time, is admissible: *Id.*

Where two persons are engaged together in the furtherance of a common design to defraud others, the declarations of each relating to the enterprise are evidence against the other, though made in the latter's absence: *Id.*

Interest is not allowable as a matter of law, in cases of tort. Its allowance as damages rests in the discretion of the jury: *Id.*

#### GOVERNMENT CLAIMS. See *Arbitration, Revenue Laws*.

#### INTEREST. See *Fraud*.

*Coupons.*—Interest warrants or coupons in a negotiable form, draw interest after payment of them is unjustly neglected or refused: *Aurora v. West*, 7 Wall.

#### INTERNATIONAL LAW.

*Sale of Vessel by Belligerent.*—A case in prize heard on "further proofs," though the transcript disclosed no order for such proofs; it having been plain, from both parties having joined in taking them, that either there was such an order, or that the proofs were taken by consent: *The Georgia*, 7 Wall.

A *bonâ fide* purchase for a commercial purpose by a neutral, in his own home port, of a ship of war of a belligerent that had fled to such port in order to escape from enemy vessels in pursuit, but which was

*bonâ fide* dismantled prior to the sale and afterwards fitted up for the merchant service, does not pass a title above the right of capture by the other belligerent: *Id.*

## JUDGMENT.

*Estoppel—Res judicata.*—A judgment, to operate as an estoppel, must be upon the same subject-matter, and between the same parties: *McKinzie v. B. and O. Railroad Co.*, 28 Md.

The term "parties," is not restricted to those who appear as plaintiff and defendant upon the record; it includes those who are directly interested in the subject-matter of the suit, knew of its pendency, and had the right to control and direct or defend it: *Id.*

Justice requires that every cause be once fairly and impartially tried; but the public tranquillity demands that having been once so tried, all litigation of that question and between the same parties, should be closed for ever: *Id.*

## LANDLORD AND TENANT.

*Distress—Tenant's Remedy for an unlawful Distress—Property in hands of Receiver.*—Where a landlord has levied a distress, and taken thereunder property of sufficient value to satisfy the rent then due, he cannot, without the consent of his tenant or other lawful cause, abandon his proceedings, and then levy a second distress for the same rent, upon the same or any other property of his tenant: *Everett, Adm. of Tough*, v. *Neff*, 28 Md.

Should a landlord abandon his first distress without justifiable cause, and levy a second, the tenant's remedy for the taking under the latter, is trespass, case, or trover: *Id.*

Where property is rightfully in the hands of a receiver, it is in the custody of the court, and cannot be distrained upon without the permission of the court by whom the receiver was appointed: in such case the landlord must apply to the court for an order on the receiver to pay the rent, or for leave to proceed by distress or otherwise: *Id.*

## LEGAL TENDER NOTES.

*Contracts for Gold Coin.*—A bond given in December, 1851, for payment of a certain sum in gold and silver coin, lawful money of the United States, with interest also in coin, at a rate specified, until repayment, cannot be discharged by a tender of United States notes issued under the Act of Congress of February 25th and two subsequent acts, and by them declared to be lawful money and a legal tender for the payment of debts: *Bronson v. Rodes*, 7 Wall.

When obligations made payable in coin are sued upon, judgment may be entered for coined dollars and parts of dollars: *Id.*

*State Taxes payable in Gold.*—An enactment in a state statute that "the sheriff shall pay over to the county treasurer the full amount of the state and school taxes in gold and silver coin," and that "the several county treasurers shall pay over to the state treasurer the state tax in gold and silver coin," infers as a legitimate if not a necessary consequence that the taxes named were required to be collected in coin. But if in the judgment of this court, this inference were not a true one, yet the Supreme Court of the state having held it to be a true one, this court will follow their adjudication: *Lane County v. Oregon*, 7 Wall.

The clause in the Act of Congress of February 25th 1862, and two subsequent acts, making notes of United States a legal tender for debts, has no reference to taxes imposed by state authority: *Id.*

#### MANDAMUS.

*Municipal Corporation—Mandamus to levy Tax.*—A return to a mandamus ordering a municipal corporation forthwith to levy a specific tax upon the taxable property of a city for the year 1865, sufficient to pay a judgment specified, collect the tax, and pay the same, or show cause to the contrary by the next term of the court, is not answered by a return that the defendants, "in obedience to the order of the court, did proceed to levy a tax of one per cent. upon the taxable property of the said city, for the purpose of paying the judgment named in the information, and other claims, and that the said tax is sufficient in amount to pay the said judgment and other claims for the payment of which it was levied." The return should have disclosed the whole act constituting the levy, so as to enable the court to determine whether it was sufficient to pay the judgment of the relator. It was also erroneous in returning that the tax was levied to pay this judgment "and other claims:" *Benbow v. Iowa City*, 7 Wall.

MUNICIPAL CORPORATION. See *Constitutional Law, Mandamus.*

#### NUISANCE.

*Suit by Individual for Public.*—An individual cannot maintain a suit to restrain a nuisance which injures him only in rights enjoyed by him as one of the public. In such case, an information must be filed for the public, in the name of the attorney-general, on behalf of the state; and it makes no difference as to the remedy, that the individual would be much more inconvenienced by the nuisance than most others: *Higbee v. The C. & A. R. R. Co.*, 4 C. E. Green.

But where the injury complained of is the building of a railroad station in the street in front of complainant's property, and he owns the soil in the street upon which it is built, the injury is to his individual rights, and not as part of the public, and the suit must be brought in his own name: *Id.*

*Smoke, Noise, &c., in Cities.*—When the prosecution of a business of itself lawful, in the neighborhood of a dwelling-house, renders the enjoyment of it materially uncomfortable by the smoke and cinders or noise or offensive odors produced by such business, although not in any degree injurious to health, the carrying on such business there is a nuisance, and will be restrained by injunction: *Ross and Others v. Butler*, 4 C. E. Green.

A clear, unmistakable nuisance, which it is intended to commit periodically, will not be permitted on the ground that it does not exist the greater part of the time, but only for a small part of it: *Id.*

The qualification that a lawful business will not be restrained for every trifling inconvenience and that persons must not stand on extreme rights and bring actions in respect to every matter of annoyance, does not refer to the *proportion of time* for which the nuisance is continued, but only to the *degree or kind of annoyance*: *Id.*

Matters that are an annoyance by being merely disagreeable or un-

sightly, as a well-kept butcher shop, or a green grocer, near a costly dwelling-house, or any other business that attracts crowds of orderly persons, or numbers of carts and carriages, although very undesirable neighbors, are not nuisances, even should they seriously affect the value of the property by driving away tenants, and prevent it being let to any who would pay high rents: *Id.*

Because a certain part of a town is occupied by tradesmen and mechanics for residences and carrying on trades which occasion some degree of noise, smoke and cinders, and contains no elegant or costly dwellings, and is not inhabited by the wealthy and luxurious, it is not *therefore* a proper and convenient place for carrying on a business which renders the dwellings there uncomfortable to the owners and their families by offensive smells, smoke, cinders, or intolerable noises: *Id.*

A dense smoke laden with cinders (caused by the burning of pine wood) and continued for twelve hours twice in each month; falling upon and penetrating houses and premises at distances varying from forty to two hundred feet, held to cause such injury, annoyance and discomfort as to constitute a legal nuisance: *Id.*

#### PARTNERSHIP.

*Compensation to Agent by Share of Profits.*—A participation in the profits of any business or undertaking, to constitute one a partner, must be a general participation in the profits as such. A person who is not a principal, has no control of the business, and no power as a partner in the firm, but who is employed as a superintendent or agent, receiving by way of compensation for his services a certain share of the profits, is not thereby a partner: *Hargrave v. Conroy*, 4 O. E. Green.

Such relation does not, as between the parties, constitute them partners, and generally does not as to strangers. If the profits are so greatly out of proportion to the services rendered as to show that the arrangement is a shift to avoid responsibility, and that creditors are injured by the abstraction of so large a part of the avails of the business, it will be held, as to them, that such person is a partner: *Id.*

But where a party agrees to serve another for a part of the profits to be derived from the business, but they are by the express terms of the agreement to be paid for his services, he cannot call for an account as partner, but he has a right to an account of the profits, and to the aid of this court in discovery and taking an account of profits: *Id.*

Where a party under a contract to perform a certain work at a certain rate, has performed part, and the performance of the residue was prevented without the fault of either party, he is entitled to payment in proportion, at the rate agreed upon for the whole: *Id.*

#### PATENT.

*New Substance from Combination of known Materials.*—When a patent is claimed for a discovery of a new substance by means of chemical combinations of known materials, it should state the component parts of the new manufacture claimed with clearness and precision, and not leave the person attempting to use the discovery to find it out "by experiment." *Tyler v. City of Boston*, 7 Wall.

The term "equivalent," when used with regard to the chemical action of such fluids as can be discovered only by experiment, only means equally good: *Id.*

Whether one compound of given proportions is substantially the same as another compound, varying the proportions, is a question of fact and for the jury: *Id.*

#### PLEADING.

*Rules—Practice—Res Judicata.*—In a case having long and complicated pleadings, where a second count of a declaration has been left by the withdrawal of a plea without an answer, so that judgment might have been had on it by *nul dicit*, a superior court will not, on error, infer, as of necessity, that a judgment below for the plaintiff was thus given; the case being one where after such withdrawal there were numerous demurrers, pleas, replications, and rejoinder, arising from a first count, and the proceedings showing that these were the subject of controversy. The second count will be taken to be waived: *Aurora City v. West*, 7 Wall.

A reversal in a court of last resort, *remanding a case*, cannot be set up as a bar to a judgment in an inferior court on the same case: *Id.*

The rule that judgment will be given against the party who commits the first fault in pleading does not apply to faults of mere form: *Id.*

The plea of *res judicata* applies to every objection urged in a second suit, when the same objection was open to the party within the legitimate scope of the pleadings in a former one, and might have been presented in it: *Id.*

PRIZE. See *International Law*.

#### PUBLIC LANDS.

*Meandered Streams—Rights of Riparian Proprietor.*—The meander lines run in surveying fractional portions of the public lands bordering upon navigable rivers, are run not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction, and which is to be paid for by the purchaser: *Railroad Co. v. Shurmeir*, 7 Wall.

Congress in providing, as it does in one or more acts relating to the survey and sale of public lands bordering upon rivers—that navigable rivers, within the territory to be surveyed, should be deemed to be public highways, and that where the opposite banks of any stream, not navigable, should belong to different persons, the stream and the bed thereof should become common to both—meant to enact that the common-law rules of riparian ownership should apply in the latter case, but that the title to lands bordering on navigable streams should stop at the stream and not come to the *medium filum*: *Id.*

But such riparian proprietors have the same right to construct suitable landings and wharfs, for the convenience of commerce and navigation, as riparian proprietors on navigable waters affected by the ebb and flow of the tide: *Id.*

A government grant of land in Minnesota (9.28 acres) bounded on one side by the Mississippi, was *held* to include a parcel (2.78 acres) four feet lower than the main body, and which at very low water was separated from it by a slough or channel 28 feet wide through which no water flowed but in which water remained in pools; where at medium water it flowed through the depression, making an island of the parcel; and where at high water the parcel was submerged; the whole place

having previous to the controversy been laid out as a city, and the municipal authorities having graded and filled up the place to the river edge of the parcel: *Id.*

If by the laws in force in Minnesota in 1859, the recording of a town or city plot indicating a dedication for a public purpose of certain parts of the land laid out, operated as a conveyance in fee to the town or city, yet it could operate only as a conveyance of the fee subject to the purpose indicated by the dedication, and subject to that it must be held by any future claimant: *Id.*

RECEIVER. See *Debtor and Creditor, Landlord and Tenant.*

#### REVENUE LAWS.

*Duties paid under protest—Jurisdiction of Court of Claims.*—Under the Act of Congress of February 26th 1845, relative to the recovery of duties paid under protest, a written protest signed by the party, with a statement of the definite grounds of objection to the duties demanded and paid, is a condition precedent to a right to sue in any court for their recovery: *Nichols v. United States*, 7 Wall.

Cases arising under the revenue laws are not within the jurisdiction of the Court of Claims: *Id.*

#### SUPREME COURT OF THE UNITED STATES.

*Jurisdiction—Practice.*—If it is apparent from the record that this court has not acquired jurisdiction of a case for want of proper appeal or writ of error, it will be dismissed although neither party ask it: *Edmonson v. Bloomshire*, 7 Wall.

An appeal or writ of error which does not bring to this court a transcript of the record before the expiration of the term to which it is returnable, is no longer a valid appeal or writ: *Id.*

Although a prayer for an appeal, and its allowance by the court below, constitute a valid appeal though no bond be given (the bond being to be given with effect at any time while the appeal is in force), yet if no transcript is filed in this court at the term next succeeding the allowance of the appeal, it has lost its vitality as an appeal: *Id.*

Such vitality cannot be restored by an order of the Circuit Court made afterwards, accepting a bond made to perfect that appeal. Nor does a recital in the citation, issued after such order, that the appeal was taken as of that date, revive the defunct appeal or constitute a new one: *Id.*

#### WILL.

*Testamentary Competency—Undue Influence.*—The law concedes to a man of sound mind the right to dispose of his property in any manner he may deem proper consistent with its policy; and it is no valid objection to a will that the testator gave his property to his wife, or to strangers to his blood, provided he was mentally competent, and was free from undue influence at the time: *Higgins et al. v. Carlton*, 28 Md.

It is not sufficient to avoid a will, that its dispositions are imprudent and unaccountable: *Id.*

The influence to vitiate a will, must be an unlawful influence, and exerted to such a degree as to amount to force or coercion, destroying



free agency; it must not be the influence of affection or attachment, nor the mere desire of gratifying the wishes of another; and there must be satisfactory proof that the will was obtained by such coercion: *Id.*

Neither age, nor sickness, nor extreme distress, nor debility of body, will disqualify a person for making a will, if sufficient intelligence remain: *Id.*

A testamentary instrument may be established against the evidence of one of three subscribing witnesses: *Id.*

### LIST OF NEW LAW BOOKS.

**ABBOTT.**—The Enactments relative to the Federal Courts. A Collection of Statutes and Rules of Court of practical utility. From advance sheets of Abbott's Treatise on the Jurisdiction and Practice of the United States Courts. By B. V. ABBOTT and AUSTIN ABBOTT. 8vo. pp. 166. New York: Diossy & Co. 1869.

**BARBOUR.**—Reports of Cases in the Supreme Court of New York. By O. L. BARBOUR. Vol. 51. Albany: W. C. Little.

**COMIC BLACKSTONE.**—By G. A. A'BECKET. With illustrations by G. Cruikshank. Chicago: Gallagher & Cookcroft. Philadelphia: Claxton, Remsen & Haffelfinger. 1869. Cl. \$2.50.

**ILLINOIS.**—Reports of Cases in the Supreme Court of Illinois. By N. L. FREEMAN. Vol. 41. Chicago: E. B. Myers. Shp. \$6.50.

**MARYLAND.**—The Constitution adopted by the Convention of 1867. With notes and references to Acts of Assembly and Decisions, etc. By E. O. HINKLEY. Baltimore: J. Murphy. Shp. \$2.

**MASSACHUSETTS.**—Reports of Cases in the Supreme Judicial Court. By CHARLES ALLEN. Vol. 14. Boston: H. O. Houghton & Co. 1869.

**NEW HAMPSHIRE.**—Reports of Cases in the Supreme Court. By A. HADLEY. Vol. 47. Concord: B. W. Sanborn & Co. Shp. \$5.

**PENNSYLVANIA.**—Reports of Cases in the Supreme Court. By P. FRAZER SMITH. Vol. 6, being Vol. 56 of Pennsylvania State Reports. Philadelphia: Kay & Bro. Shp. \$4.50.

**TRACY.**—Address to the Graduating Class of the Law School of Columbia College. By CHARLES TRACY. Pamph. pp. 22. New York: Published by the Trustees. 1868.

**UNITED STATES.**—Opinions of the Attorneys-General of the United States. Edited by J. HUBLEY ASHTON. Vol. 11. Washington: Morrissons. 1869.

**WINES.**—Commentaries on the Laws of the Ancient Hebrews, with an Introductory Essay on Civil Society and Government. By E. C. WINES, D. D. 1 vol. 8vo. Philadelphia: Pres. Board of Pub. \$2.50.

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THE JUDICIAL SYSTEM OF SCOTLAND.

As to judicial jurisdiction, Scotland and England, although politically under the same crown, and under the supreme sway of one united legislature, are to be considered as independent foreign countries, unconnected with each other. Cases of a judicial nature are to be treated as if they had occurred in the reign of Queen Elizabeth. A decree of the English Court of Chancery is not entitled to more respect in Scotland than a decree (interlocutor) of the Scottish Court of Session in England: 4 Macqueen R. 49, 50. English judges are not to be consulted on Scotch appeals: 3 Id. 691.

It should, however, be added that while the English Court of Chancery has regularly no jurisdiction over domiciled Scotchmen, this rule may be changed by Parliament, as it has been in the case of contributories under the act relating to joint stock companies: *Moyes v. Whinney*, 3 Session Cases (3d series) 183.

The general organization of the Scotch Courts at the present time is as follows: 1. Justices of the Peace. 2. Sheriffs and Sheriffs' Substitute. 3. The Court of Session. 4. The Bill Chamber. 5. The High Court of Justiciary. 6. The Court of Exchequer. 7. The Court of Teinds. 8. Local Courts. The fourth, fifth, sixth, and seventh courts are composed of members of the Court of Session.

### I. *Justices of the Peace.*

These are appointed by commission under the Great Seal. Their number is not limited. No pecuniary or other property qualification is required. They continue in office until six months after the death of the sovereign who appoints them.

In criminal matters the precise limit of their powers is doubtful, except where they are specially conferred by statute. Any two or more of their number hold, in districts in their respective counties, a court of "petty sessions," in which the majority of criminal cases coming before justices is tried. The whole body of justices in the county hold the Quarter Sessions, hearing appeals from the petty sessions. Appeals lie in certain cases from the Quarter Sessions to the Court of Session, hereafter described. See *Avondale v. Whitelaw*, 3 Session Cases (8d series) 263.

The justices also have civil jurisdiction in "small debt" causes, conferred upon them by statute. The amount in question must not exceed 5*l*. They are required to hear the parties *viva voce*, and may examine them with or without oath, and may also swear witnesses. The pleadings must be oral. Any debt found due may be ordered to be paid by instalments. No appeal is allowed except upon the ground of malice or oppression, though a rehearing may in certain cases be had before the justices themselves. The jurisdiction thus conferred does not extend to cases of title to land.

### II. *Court of the Sheriff or Sheriff's Substitute.*

The sheriff is the principal local judge of the county. He possesses both civil and criminal jurisdiction. In civil matters it extends to all actions upon contract and for damages, but not for heritable property. Admiralty jurisdiction is also conferred upon him within his sheriffdom, and even extends to foreigners there served with process: 5 Court of Session Cases (8d series) 497. Each sheriff has one or more substitutes by whom the principal part of the judicial business is performed. In fact, the judicial office of the sheriff is principally nominal. The substitutes are appointed by the sheriff, but are not removable except with the consent of the judges of the Court of Session. On this system cases are heard in the first instance by the sheriff substitute, whereupon the unsuccessful party may, by a simple proceeding, appeal

to the sheriff, and from him in proper cases to the Court of Session. The theory of judicial organization which permits a judge to appoint a deputy, is justly objected to by text writers, and is a remnant of an ancient usage which permitted all judges to delegate their authority: Glassford on Scotch Courts, p. 35.

By recent statutes, power has been conferred on the sheriff to exercise a summary jurisdiction in cases of "small debts" not exceeding 12*l*. The rules adopted in this class of cases are not materially different from those which prevail in Justices' Courts. No written pleadings are allowed without special leave of the court. Circuits to try these causes are held in different parts of the county, in some instances as often as once a month. Appeals lie to the Court of Justiciary (a criminal court to be hereafter described), only on grounds of corruption, malice, oppression, deviation from statutory forms indicating wilfulness, incompetency and defect of jurisdiction. This court must be a popular one, as the amount to which its jurisdiction applies has recently been extended from 8*l*. to 12*l*. Parties may by mutual consent provide that causes of a larger amount than 12*l*. may be heard in a summary way.

In other cases, the right of appeal is limited so that the sheriff's decision is final, unless the amount exceeds 25*l*.: 5 Court of Session Cases (3d series) 1003. Where the right of appeal exists there may be a stipulation that one appeal shall be final. Should an appeal in a civil case be improperly taken to the Court of Justiciary, it may be certified by that court to the Court of Session where it properly belongs: 24 Cases in the Court of Session (2d series) 487.

The sheriff has also criminal jurisdiction in all cases which do not infer death or banishment from Scotland. This extensive jurisdiction can, by recent statutes, only be exercised with a jury. He also acts as a ministerial officer in analogy to his duties under our own law.

The sheriff and his deputy or substitute, must be an advocate of three years' standing. The substitute must be certified by the Lord President of the Court of Session or the Lord Justice Clerk, to be duly qualified to hold the office.

The office of sheriff is held during good behavior, though there is a provision for a pension after long service. He may be removed for malfeasance in office by a proceeding on the part of

the Attorney-General or of four freeholders, before the Court of Session.

### III. *Courts of which the Judges of the Court of Session are members.*

#### 1. *Court of Session.*

All cases of a civil nature may be heard by the Court of Session, whether they be common law, equity, admiralty or probate,<sup>1</sup> with the exception of cases specially affected by Act of Parliament, and those involving a pecuniary amount not exceeding 25*l.*, which must be brought in an inferior court.

This court has a double function, being both a tribunal of original jurisdiction and a court of review. Its organization has varied much from time to time. It originally consisted of fifteen members. As a court of original jurisdiction it consisted of a single judge, whose duties were ascertained by a complicated system of rotation. As an appellate court, it was composed of the fifteen judges. This was an absurd arrangement, and the court was an object of ridicule, even by grave judicial functionaries. Lord Eldon gives the following anecdote from the bench: He said—"We shall get the House of Lords into the same difficulty as Sir James Boswell once placed me. I had the honor of arguing a case before the bar of the House of Lords with him, and, being senior in the profession, I stated with all humility the extreme pressure under which I labored, for I was to argue against the unanimous opinion of the fifteen judges. He came to the bar (with what degree of modesty is not for me to determine), but he blamed me to the House for prejudicing the cause of my client, stating that when the judges differed they thought very little about the matter, and when they agreed they thought nothing at all about it:" 4 Wilson and Shaw 211. Mr. Black, editor of the Morning Chronicle, said the court of fifteen was a regular bear garden, although some of the judges, more pacific than the others, slept on the bench during the argument, particularly Lord A., who had to be roused to give his vote. The Lord President in telling the division would ask, "My Lord A., how does your Lord-

<sup>1</sup> There are, however, "Commissary Courts" in each county in Scotland which grant formal probate. If a person dies domiciled abroad, the Commissary Court of Edinburgh has jurisdiction over assets in Scotland: 21 & 22 Vict. c. 56.

ship vote?" Lord A., fairly awake, would answer by a counter question, "How does my Lord Justice Clerk vote?" The President would reply, "My Lord Justice Clerk *adheres*," upon which Lord A. would at once tender his vote thus, "Then I adhere." His Lordship having thus discharged his duty would resume his nap, for he was extremely comatose: 2 Macqueen 685.<sup>1</sup>

The feebleness of the Court affected professional opinion so much as to suggest a change in its organization. In 1807, it was proposed to divide the Court of fifteen into three courts of five judges each, one of them to try causes with juries, and another with a Chancellor at its head, acting as an intermediate court of appeal between the Court of Session and the House of Lords. Public opinion was strongly divided in respect to this plan. David Hume headed the opposition, and Walter Scott is said to have shed tears over the abolition of the old court.

The plan ultimately adopted consisted in an organization of the court which will now be explained.

The number of the court was reduced to thirteen. For the purpose of original jurisdiction a single judge is selected, who is called "Lord Ordinary." Of these there are five who do not in general participate in the deliberations of the judges who form the appellate branch of the court. They are the five junior judges. At one time these Lords sat in the appellate court on a system of rotation, but as that course is no longer adopted, they are called "permanent Lords Ordinary." They are also designated as the "Outer House." The eight other judges, when collectively contrasted with "the Lords Ordinary," are known as the "Inner House." They are divided into two divisions of four each. The Chief Judge in the first division bears the title of Lord President, and the same officer in the second division is the Lord Justice Clerk.

Should an attempt be made to compare this system with theories with which we are familiar, it might be said that the Lords Ordinary answer in many respects to the Circuit Judge and Vice

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<sup>1</sup> This "comatose" condition was not a new thing with Scotch judges. At the trial of Lord Argyle, in the reign of Charles II., for treason, "one of the judges was deaf and so old that he could not sit all the while the trial lasted, but went home and to bed. The other four were equally divided: so the old judge was sent for, and he turned it against Lord Argyle." Burnet's History of His Own Times, book 3.

Chancellor of the New York Constitution of 1821, while the first and second divisions of the Inner House correspond substantially to a double Supreme Court of that Constitution. This remark, however, is only true in general, for there are many essential points of difference between the two systems. Thus the Lords Ordinary, acting singly, may still hear appeals from decisions in the Sheriff's Court, though if a motion is made by either party, an appeal may be taken directly to the Court of Review without first being heard by the Lord Ordinary: 13 & 14 Vict. c. 36, § 32. So, on the other hand, there are occasions in which the judges of the "Outer House" are called in to act as members of the Court of Review, as when one of that body is necessarily absent or sick. There are also cases of great difficulty in which the opinion of the thirteen judges is taken. It is thus perceived that while at first sight there would appear to be three courts, yet for some purposes the old theory of a single tribunal still remains.

(1). *The permanent Lords Ordinary.*

The inference would readily be made from what has been said that causes must be heard before a single judge before they can be presented to a full bench of four judges. There are, however, cases of an extraordinary nature in which the "Inner House" has original jurisdiction. So the Lord Ordinary can refer a cause for advice to the division of the Inner House, to which he is for the time being attached. This is technically called "great *avisandum*." It is doubtful whether he can thus refer a question occurring in the course of a trial, though in a recent case the judges said they would be glad to give him informally the benefit of their advice: 24 Session Cases 300 (A. D. 1862).

The mode of determining before what Lord Ordinary any particular case shall be heard is singular. When a cause is brought into court, the party bringing the action, and in some few cases the respondent (13 & 14 Vict. c. 46, § 33), indicates before what judge he wishes the case to proceed, and to what division of the Court of Review he wishes to go in case of an appeal. The Lord Ordinary selected is deemed for the time being to be attached to the division in which the appeal is to be heard. This restriction has lately been added, that if the business accumulates too much in one tribunal, the president may redistribute it among the respective judges.

The discussion before the Lord Ordinary is often very elaborate and extensive. The regular course is to pronounce judgment at the close of the argument. He may, however, in general, reserve the cause for private consideration. This is not necessarily the case, for in some instances an order of court is necessary. This consideration is called "avisandum."

The judgment of the Lord Ordinary, unless appealed from, has the effect of a judgment of either division.

Trial by jury in civil cases did not exist until 1815. In that year great improvements were introduced into procedure through a royal commission. The leading changes, besides the introduction of juries, consisted in a system of pleadings, the use of oral instead of written arguments, and the earlier finality of judgments. Before that time, all testimony was taken on commission; records were unknown, and single judgments were not final. Says Cockburn: "The change was opposed by resolutions in every burgh and county in Scotland. The town councils and lairds were unanimously against it. The zeal of those opposed was extraordinary, but every commissioner was in favor of it, and it was adopted." P. 385.

There is now a separate roll of causes, called a "jury roll." There are but few causes tried by a jury, as a matter of course, and in general it is discretionary with the court whether there shall be a jury trial or not. This mode of trial is said by high authority still to be an "exotic" in Scotland, and issues are often so loosely framed as to call for animadversion in the House of Lords. The Lords Ordinary act as circuit judges, unless different arrangements are made by the Court of Session. An appeal lies to the proper division of the "Inner House," either on a bill of exceptions (and it must in that case be brought in with great promptness), or on the ground that the judgment is not sustained by the verdict. Jury issues may, by consent of the parties, be tried by the judge, without a jury. He must, in that case, find the facts specifically. He may review his findings upon his own minutes, when after argument, he may correct them or order a new trial. His findings of fact are final, unless they proceed on erroneous conclusions of law, such as the improper admission or rejection of evidence. Instead of a regular jury, the parties may select three, five or seven persons, who are sworn and sit as a jury. Exceptions may be taken to the rulings of the judge, but



no new trial can be had on the ground that the verdict is against evidence. This appears to be a combination of an arbitration and a trial.

(2). *The Inner House.*

Without further pursuing the proceedings of the Lords Ordinary, we now recur to the more detailed consideration of the organization of the Court of Session, acting as a court of appellate jurisdiction. Appeals are made in two ways—one by “reclaiming note,” the other by “advocation”—the former being from the Lord Ordinary, and the latter from an inferior court. A very marked distinction is made between the presiding judge and the other judges. Thus, the Lord President receives a salary of 4800*l.*, the Lord Justice Clerk of 4500*l.*, and each of the other judges 3000*l.* There are also indications in the cases that the opinions of the presiding judges have somewhat greater authority than the others, or, in the language of an old English judge, “that opinions are weighed rather than counted.”

The mode adopted for disposing of causes is somewhat peculiar. There is a difference between the discussion of a cause and “hearing” it. The word “hearing” has a technical meaning and implies an elaborate oral argument, while in many discussions on appeal, a case which may have been elaborately discussed before the Lord Ordinary, is disposed of in a few minutes. This peculiarity grows out of an old practice, the effects of which are not entirely removed.

Whenever a vacancy occurs in either division, any judge of the other division may at his request be appointed to fill the vacancy. The vacancy occasioned by his transfer is filled by the appointment of the senior “permanent Lord Ordinary.” If no transfer is made, the original vacancy is supplied by the appointment of the senior permanent Lords Ordinary. In this manner the Appellate Court is continually recruited by appointment from the judges of original jurisdiction.

It is manifest that there are two objections to an Appellate Court so organized. One is that as it consists of four, there may be an equality of voices, and consequently no judgment; the other is, that as there are two co-ordinate courts, there may be opposing decisions, and no valid precedent established. The modes devised

for meeting or palliating the difficulties thus occasioned will now be detailed.

In the first case, of an equality of voices, the case is reserved for further discussion. The permanent Lord Ordinary who heard the cause may be called in to attend the rehearing, and, the court thus consisting of five judges, a majority may be obtained.

It is also provided by statute, that when either division is equally divided, they may call in three judges of the other house, when a majority shall decide the cause, though it is deemed to be the judgment of the division before which the case is pending: 13 & 14 Vict. c. 36, § 35.

In respect to the second case, it is plain that the organization of a double Appellate Court is open to the objection of causing uncertainty in the law. Says Glassford: "Although the two courts are denominated, First and Second Chambers of Session, and are still understood and declared to form a sole and aggregate body for certain special purposes, yet in regard to all the important and significant ends of such establishments, they are by their constitution co-ordinate and supreme courts having independent authority. But where two courts holding jurisdiction of the same pleas have also an equal supremacy, it is plain that the law may be differently interpreted by them, and certain that at some period the discrepancy will take place." Pp. 66, 67.

It is provided by statute that it shall be competent to the judges of either division, in cases which shall appear to be of importance and difficulty, to state questions of law arising in such cases, and to require the opinions of the judges of the rest of the court, which shall be given by them in a collective capacity, or individually. See *Sharpe v. McLeod*, 23 Session Cases (2d series) 1015. This method, however, is imperfect, as its adoption is discretionary with the court, and no mode is provided by which the suitor can require a general consultation.

### (3). *The Appellate Jurisdiction of the House of Lords.*

An appeal lies from the judgment of either division to the House of Lords, and in this manner a certain amount of uniformity of decision is maintained. This appeal is expensive, and only advisable in important cases. It involves frequently great delay and circuitry of procedure. The House of Lords may think it wise to have a reconsideration of the case in Scotland, when it

may be remitted to the thirteen judges. This is called a "hearing in presence."

Perhaps the working of the system in this respect will be best shown by the statement of an actual case from the reports. A case was heard before a Lord Ordinary. It was thence appealed to the first division of the Court of Session—it was thence carried to the House of Lords. It was remitted by that body to the thirteen judges to be "heard in presence." The whole record was ordered to be opened, so as to enable parties to amend their pleadings. On the new hearing the thirteen judges delivered their opinions *seriatim*. A doubt then arose whether the former appeal was not destroyed by the opening of the record, and after all this discussion the whole case is treated by the reporter as undisposed of: 1 Macqueen R. 15, 35.

The House of Lords, besides requiring a "hearing in presence," may order the judges of the court not belonging to the division from which the appeal is taken, to be consulted. They are then called "consulted judges."

It should be remarked that the same process may be resorted to when the cause originated before the Sheriff's Court, and came into the Court of Session by appeal. A single illustration will suffice. A cause was heard before the sheriff's substitute; it then came before the sheriff on appeal; it was then carried to the Court of Session, where it was heard by the Ordinary; it was thence appealed to the first division (four judges), who, after a hearing, required an argument before the eight appeal judges, and then required an opinion in writing from the thirteen judges; an appeal was thence taken to the House of Lords: 1 Macqueen, bet. 121 and 160.

There is undoubtedly one great advantage in this thoroughness of discussion. It is likely to settle principles, though at enormous expense to the suitor. English courts quite frequently avail themselves of Scotch opinions in cases of general law: 1 Macqueen 160. Suitors are sometimes inflamed with a desire to produce a valid precedent. Thus, in one case, the subject-matter of the action was worth 2*l.* per year. There had been four actions in the Court of Session, and an appeal to the House of Lords. On a second appeal to that body, Lord Brougham asked, "What advantage will be gained by succeeding?" It was answered, "The satisfaction of settling the law:" 1 Macqueen 191.

Appeals to the House of Lords can, in general, only be taken from final judgments, although there may be an appeal from an interlocutory judgment with leave of the judges of the Session, or when there is a difference of opinion among them: 4 Macqueen 352.

There has been great difference of opinion as to the propriety of permitting English judges in the "House of Lords" to sit as a court of revision over the decisions of Scotch judges. It is well known that the Scotch system of jurisprudence is radically different from the English, being based on the Roman or civil law, instead of the common law.

Some of the ablest Scottish jurists, however, approve of it as infusing a liberal element into their law. Scotland, they say, is "too narrow," and the benefits of the wider views taken by English lawyers, owing to their broad field of investigation, are often conspicuous. These remarks have been applied to the judgment of Lord Brougham in the famous Warrender Case, of which it has been said, that it verifies the remark of Mr. Hume, that in matters of reasoning, the arguments, when just, can never be too refined: 2 Macqueen 664. It has been thought wise to have at least one of the ablest of the Scotch jurists in the House of Lords, to be consulted in delicate cases, and who, being removed from that country, may be supposed to have left behind him any prepossessions derived from an exclusive attention to Scotch jurisprudence.

Lord Colonsay became on this account a member of the House of Lords.

## 2. *Bill Chamber.*

The duties of this court are to make orders of arrest, attachment, and of preferential judgments or "diligence," so called, &c., &c. One of the Lords Ordinary attends to this business in term time, while during vacation the six lords who do not sit in the Court of Justiciary officiate for a fixed number of days in rotation.

## 3. *The High Court of Justiciary.*

This court is composed of the Lord President of the Session, who is then called Lord Justice General, the Lord Justice Clerk, and five other judges of the session, specially commissioned by the King. The Lord President is rarely in attendance, so that the inconvenience of having two chief judges on the bench seldom

happens. A quorum consists of three judges. It has jurisdiction of all criminal cases, except high treason, which is tried by a special commission of Oyer and Terminer, in the English manner, with a grand jury. Three justiciary judges are in that commission. This court holds sessions in banc and circuits twice a year, at various points in the kingdom. The English House of Lords has awarded these tribunals very high praise. It has said that trials by jury in Scotland, in criminal cases, have been admirably conducted, and there is no country in the world where criminal law is more admirably administered: *Ritchie v. Ritchie*, 4 Macqueen 165. The Justiciary Court (circuit) also hears appeals in summary cases from the sheriff, &c. There is understood to be no appeal from this court to the House of Lords.

#### 4. *Court of Exchequer.*

This is composed of two of the Lords of Session who are not members of the High Court of Justiciary. They hold office for a year at a time. The jurisdiction of this tribunal has been much reduced in modern times, and chiefly consists of issuing writs of execution (extent) and conducting other judicial matters connected with the revenue. Should a revenue case be pending before a sheriff, the Lord Ordinary in the Exchequer may stay the proceeding by interdict, so as to have the matter heard before a competent tribunal, and no appeal is necessary: 23 Session Cases (2d series) 1015. The Scotch Exchequer statutes do not deprive the Court of Session of its original jurisdiction: 4 Macqueen 89.

#### 5. *Court of Teinds, (or Tithes).*

This is also composed of members of the Court of Session. Its jurisdiction consists of cases arising under the laws relating to church tithes.

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The judges of the Court of Session and of the courts thus formed out of it are appointed by the Crown, and are at present men of great learning and skill in their profession. They hold office during good behavior, although they may retire at the end of fifteen years, receiving an annuity equal to three-fourths of the salary: Glassford 3.

Certain forms are prescribed by law for ascertaining their quali-

fications to act as judges, for which consult Bell's Scotch Law Dictionary.

In closing this review of the higher Scotch courts, one cannot but be struck with the immense and multifarious business transacted by the judges of the Court of Session. In their proper character as a court they have to do with all the legal matters of the country, whether legal or equitable, maritime or ecclesiastical. The Inner House is in session from November 12th to March 11th, and from May 20th to July 20th. The Ordinaries, from November 1st to March 20th, and from May 20th to July 20th. More than half of the entire year is thus occupied. In the vacation the various judges are acting in the High Court of Justiciary, or holding its circuits; or in the Bill Chamber, the Court of Exchequer, or the Court of Teinds. How can so much work be accomplished? In the year 1839, thirteen judgeships were abolished, saving the government over fifty thousand pounds, and the duties of these officers were imposed on the judges of the Court of Session. As an offset to this increase of duty, their salaries were largely augmented. British statesmen have perceived that the true course is to fully occupy the time of the judges, pay them large and honorable salaries, make their tenure permanent, and pay them, if after a lengthened and honorable service they desire to retire, a competent annuity. Call it not a pension, but an honorarium—a tribute from a grateful State for honorable and most valuable service. On such terms, it is the highest honor in the State to fill the post of judge, and the ablest lawyers may faithfully, contentedly, and earnestly devote to it the energy of their lives.

#### IV. *Inferior Local Courts.*

There is a "Merk" Court held in the city of Edinburgh to hear small causes, and also claims for servants' wages to any amount.

There are also Bailie and Sequestration Courts held in that city every Friday.

There is a Dean of Guild Court for settling disputes between merchant and merchant, and merchant and mariner.

Recent statutes provide that certain disputes between manufacturers and their workmen shall be settled in a summary manner before inferior magistrates, to which, if the parties do not consent, a compulsory arbitration is required: Forsyth's Dictionary.

The "Burgh" Courts, which were formerly of considerable importance, are now insignificant, their jurisdiction mainly consisting in the cognisance of trifling criminal causes.

T. W. D.

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RECENT AMERICAN DECISIONS.

*Superior Court of Cincinnati.*

BAILEY v. BERRY ET AL.

Joint trespassers may be sued together, or any of them separately, and the non-joinder of the others is no defence.

A release to one of several joint trespassers will discharge all; but it must be a technical release, not merely a covenant not to sue, or other instrument amounting to a release by implication merely.

Where plaintiff sued joint trespassers and then made an agreement with a portion of them to withdraw the suit as to them for a certain sum of money, and in pursuance of this agreement made an entry on the record that he was unwilling further to prosecute his action against the parties named, and as to them the action was dismissed, *held*, that the others were not discharged, but they were entitled to have the jury instructed, in making up their verdict to deduct the amount received already by plaintiff from the amount of damages sustained by him.

THIS was a case reserved from Special Term upon the pleadings and the evidence contained in the bill of exceptions.

In February 1860, the plaintiff filed his petition against J. Q. A. Foster and fifteen other persons, for an alleged trespass upon his property, in Campbell county, Ky., and in March, in the same year, by leave, filed his amended petition, claiming damages for the injury described in the former pleading.

Five of the defendants, B. Taylor, Hallam, Piner, Root, and Winston, filed demurrers to the petition, which, after argument, were overruled.

On the 16th of June 1862, Charles Air answered with a general denial of the allegations of the petition.

While the action was pending, an entry was made upon the minutes by the plaintiff, that he would not further prosecute his claim against four of the defendants, James Taylor, Jr., Barry Taylor, John Taylor, and James R. Hallam, as to whom the action was dismissed.

Subsequent to this, Berry, Winston, Root, and Air filed answers,

to portions of which the plaintiff demurred, and his demurrer was afterwards overruled. In March 1866, the plaintiff, by leave, filed an amended petition, in which he set forth that in October 1859, at Newport, Ky., he was the owner and in possession of several printing presses, and divers articles attached to his printing establishment, including a large quantity of type, of the value of ten thousand dollars, which the defendants had unlawfully taken and converted to their own use, for which sum he asked judgment. To this last amended petition the defendants Winston, Berry, Air, and Root severally answered, denying the matters alleged against them generally, and setting up, as a bar to the action against them, "that since its commencement the plaintiff had, in consideration of \$1500, paid to him by J. R. Hallam, Barry Taylor, and James Taylor, Jr., who were originally their co-defendants in the action, settled, released, and discharged said defendants, from whom said sum was received, from any and all liability for the wrong and injury committed by them, and, as they were all joint trespassers, the release of those parties discharged all the wrongdoers." To this last allegation in their answer the plaintiff replies by a denial of the whole statement.

On these pleadings the case was tried before a jury. The evidence, which is fully contained in the bill of exceptions, was submitted to the jury, and a verdict rendered in favor of the plaintiff for \$2556 against all the defendants remaining on the record.

To establish the fact of the release alleged in the answer, written and oral testimony was heard, which was uncontradicted, but the effect of which, the judge, who tried the cause, held to be a legal question only, and directed that a verdict should be rendered upon the whole evidence offered to establish the plaintiff's right to recover, as well as that of the defendants to oppose it, subject however, to the opinion of the court, on the law arising upon the alleged release.

The defendants afterwards severally moved for a new trial.

*Stallo and Kittredge*, for plaintiff.

*Jordans and Jackson*, for defendants.

The opinion of the court was delivered by

STORER, J.—The important question for us to consider, as the counsel upon both sides admit, is, what was the effect of the entry



by which four of the defendants were dismissed from the action; does it apply only to those named, or does it extend to all the defendants?

The entry is, in substance, this: "The plaintiff comes and makes to the court known that he is unwilling further to prosecute this action against the parties described, and thereupon they are adjudged to go hence without day, and as to them the action is dismissed, at their proportion of the costs then accrued."

It cannot be claimed that this dismissal, which is equivalent only to a judgment of *nol. pros.* at the common law, can operate either for or against the other defendants. No such effect would be produced even in a criminal case. This was held in *Rex v. Sergeant*, 12 Mod. 320, and is now the settled law.

We find in the early case of *Parker v. Lawrence*, decided in the reign of James I., Hobart 70, that the court were of opinion that a *nol. pros.* as to one or more joint trespassers, before judgment, would discharge the action. But in the next reign the case just quoted was overruled, and the court held that a discontinuance as to one defendant was a mere agreement to relinquish the action as to him only, and he alone could take advantage of it, the plaintiff being still at liberty to proceed against the other defendants: *Walsh v. Bishop*, Cro. Car. 243.

Since this decision the current of the law has been uniform upon the point. We find it settled in *Noke v. Ingham*, 1 Wilson 90; *Dale v. Eyre*, Id. 306; *Cooper v. Tiffin*, 3 T. R. 511; *Mitchell v. Milbank*, 6 T. R. 200.

The cases are carefully collected and approved by Sergeant Williams in his note to *Salmon v. Smith*, 1 Saunders 206, note 2, and establish fully the rule we have indicated, that a *nol. pros.* dismissal or discontinuance as to one defendant, before judgment, does not enure to the benefit of the others. And thus it is when an infant or a married woman are jointly sued with another, a plaintiff may enter a *nol. pros.* as to the minor or the *feme covert*, without affecting the liability of the other party to the suit: *Pell v. Pell*, 20 Johns. 126; *Woodward v. Newhall*, 1 Pickering 500.

The principle which governs all these decisions implies that the party injured by co-trespassers, or who is the creditor of co-debtors, may sue either one of the individuals against whom the action may be brought; he is not bound to prosecute all, and, although a plea in abatement is permitted in case of the non-joinder of debtors,

the privilege does not extend to tort-feasors, all are regarded as principals, and neither the omission to sue all, nor, if all are sued, the dismissal of one of them from the suit, can be pleaded by the other parties in bar.

From a very early period it has been held that the absolute release of one joint trespasser from his liability, discharges all who may have participated in the act; such is the language in Co. Litt. section 376, and contemporaneous cases of *Cocke v. Jenner*, Hob. 66, and *Hitchcock v. Thornland*, 3 Leonard 122. All united to produce the injury, there was a common purpose to be accomplished by the result, and there could be no severance of the liability. Hence, if there was a remission of his liability to one, it became the privilege of all. These decisions have since been followed by the English and American courts, wherever the state of facts warranted their application, and we need not refer to the numerous adjudications which have sustained the principle. In *Ellis v. Bützer*, 2 Ohio 89, it is fully admitted.

But the release pleaded, as a discharge for all, that has been given to one only, must be a technical release, under seal, expressly stating the cause of action to be discharged, with all conditions or exceptions: *Fitch v. Sutton*, 5 East 282; *Rowley v. Stoddard*, 7 Johns. 207; *Dezeng v. Baily*, 9 Wend. 336; *Shaw v. Pratt*, 22 Pick. 305; *Mason v. Joutets' Adm'r.*, 2 Dana 107; *Miller v. Fenton*, 11 Paige 18; *Hoffman v. Dunlap*, 1 Barb. 185; *Crawford v. Millspough*, 13 Johns. 87; *Seymour v. Minturn*, 17 Id. 169; *Couch v. Mills*, 21 Wend. 425; *Jackson v. Stackhouse*, 1 Cowen 122.

So strictly are these technicalities adhered to, that no release is allowed by implication; it must be the immediate legal result of the terms of the instrument which contains the stipulation; hence it is that a covenant not to sue, or to assert a claim, or in any manner to hold liable one joint debtor or trespasser, though it operates between the immediate parties, does not extend to the others.

Thus, in the early case of *Hitchcock v. Thornland*, already referred to, where it was admitted a release to one would discharge all, the distinction we have stated was recognised by ATKINSON, J.; and in *Lacy v. Kynaston*, 1 Lord Raym. 689, reported also in 12 Mod. 548, where the question came directly before the judges, it was held that a covenant not to sue was personal to the

covenantee only, and could not be set up by other parties. In those cases it was well observed, that such a covenant operated as a release between the parties themselves, to avoid circuity of action, but could not extend further, "as if A. and B. be jointly and severally bound to C. in a sum certain, and C. covenants with B. not to sue him. That shall not be a release but a covenant only, because he covenants only not to sue B., but does not covenant not to sue A., against whom he still has his remedy." Late in the last century the case of *Dean v. Newhall*, 8 T. R. 168, was determined by Lord KENYON, where the defendant pleaded that his principal, with whom he was jointly bound, having been, as he claimed, released by an agreement under seal, which obligated the plaintiff not to sue him, and if he did, the agreement thus made "should be a sufficient release and discharge to all intents and purposes, both at law and in equity to and for the debtor, his executors, &c." It was argued that this agreement was a release of the right of action against principal and surety, but, in reply, the case we have cited from Raymond was referred to, and his Lordship, in giving the opinion of the whole court, said: "The case of *Lacy v. Kynaston* removes all difficulty on this subject, and is a direct authority for the plaintiff. I had only been doubting in my own mind on the strict law of the case, for that the honesty and justice of it are with the plaintiff, cannot be doubted. Even if the defendant had succeeded here, a Court of Equity would have given the plaintiff full relief. But I am glad to find, by the case cited, that we are fully warranted in deciding for the plaintiff on legal grounds." Since the determination of this case, there is not, we believe, a single reported decision, opposed to the principle it affirms, to be found in the English Courts, and we might quote cases *ad libitum* to the same point, if there could be a doubt of the correctness of our statement: *Farrell v. Forest*, 2 Saund. 48, note 1.

In the American courts the same rule is adhered to without exception: *McLellan v. Cumberland Bank*, 24 Maine 566; *McAlister v. Sprague*, 34 Id. 296; *Walker v. McCullough*, 4 Greenl. 421; *Tuckerman v. Newhall*, 17 Mass. 581; *Shaw v. Pratt*, 22 Pick. 805; *Smith v. Bartholomew*, 1 Metc. 276; *Brown v. Marsh*, 7 Vt. 827; *Durell v. Wendell*, 8 N. H. 369; *Snow v. Chandler*, 10 Id. 92; *Crane Adm'r. v. Alling*, 8 Green N. J. 423; *Catskill Bank v. Messenger*, 9 Cowen 38; *Rowley v. Stoddard*, 7

Johns. 207; *Couch v. Mills*, 21 Wend. 424; *Bronson v. Fitzhugh*, 1 Hill 185; *Frink v. Green*, 5 Barb. 455.

The courts, in the examination of the numerous decided cases, have been required to give a construction to every conceivable stipulation inserted in the agreements which have been pleaded as releases of liability, and have invariably pursued the same course in yielding nothing to mere implication, wherever words of release are found in the instrument. The intention of the parties is alone regarded, holding the established legal maxim, that where a particular purpose is to be accomplished, and language which expresses it is clear and certain, no general words subsequently used in the same agreement shall extend the meaning of the parties: *Thorpe v. Thorpe*, 1 Lord Raym. 235.

DALLAS, C. J., in *Solly v. Forbes*, 2 Brod. & Bing. 46, having examined the leading cases, observes, as courts look at the intention of the parties, in modern times more than formerly, rather than the strict letter, not suffering the latter to defeat the former, held that general words of release even, could not be operative to enlarge a previous statement which defined the particular object for which the agreement was made. The same principle is found in *Turpenny v. Young*, 5 Dowl. & Ry. 262, and is referred to and affirmed in *Thompson v. Lach*, 3 M., G. & Scott 551. See also *North v. Wakefield*, 13 Ad. & E. 540.

On similar grounds, it was held, in *McAllister v. Sprague*, 34 Maine 297, where a receipt had been given by a creditor to one of his joint debtors, which recited that the debtor had paid a certain sum in full of his half of the debt, due jointly by him and another, and which was to be his discharge in full for debt and costs, but no discharge of the co-debtor. It was decided that this could not be pleaded as a release by the other judgment-debtor, the intention of the parties being that his liability should still remain. See also *Durell v. Wendell*, 8 N. H. 369.

Having thus ascertained what is now the established rule in deciding the question raised by the defendant, let us now examine the facts, as they are found proved in the bill of exceptions, and to which there is no contradiction.

Before we proceed, however, it is proper to consider how far the entry on record, by which the defendants Taylor and Hallam were dismissed from the suit, can be explained or enlarged by parol evidence. The purpose is plainly stated, and as to the par-

ties named therein, it was a legal discharge from the pending proceedings, but how far it was a bar to a subsequent action, is not now a question, as counsel admit it would be barred by the statute. As the only written evidence of an arrangement between the plaintiff and these parties, is the record made at the time, and without which it would be difficult to say how these parties could avail themselves of the alleged benefit they had secured, it would seem to be inconsistent with the established rule of evidence to permit any explanation where there is neither ambiguity in the terms used, or the purpose intended to be accomplished.

But to give the testimony its full weight, the result of a careful analysis of the whole is this: During the pendency of this suit, the counsel of both parties met the father (Col. Taylor) of two of the then defendants, and with Hallam, another, the plaintiff also being present, when it was agreed that fifteen hundred dollars should be paid, and these defendants dismissed or released from the action, reserving to the plaintiff his right to proceed against the other defendants. The money was paid by Col. Taylor, and the entry referred to made accordingly.

If then, we apply the doctrine already stated, where written instruments, pleaded as releases, have been construed by the courts, we cannot perceive that the arrangement made by the plaintiff with the defendants, is without the rule.

To give it all the weight to which it is justly entitled, it must be determined upon the same principles which control every similar case, however formal may be the evidence to establish the facts.

The result of our investigation has led us all to conclude that neither the entry on the record dismissing three of the defendants from the action, or the arrangement made with the parties, which preceded that entry, and on which the agreement to dismiss was founded, can be regarded as a discharge in law of the defendants who still remain on the record.

First—Because they are not technical releases in writing sealed by the proper party.

Second—That if they could be construed as implying an agreement not to sue, they can avail only to the defendants with whom they were made, and cannot operate for the benefit of the defendants who set up the facts in discharge of the plaintiff's action against them.

Third—That the entry referred to dismisses the defendants only from the action, without reference to their co-defendants. It was the privilege of the plaintiff to have entered a *nol. pros.* or discontinuance as to any one or more of the defendants, and the dismissal in the case before us but produces the same result.

The plaintiff might have sued either of the defendants, or all, and as it would be no ground of defence that other parties were not joined, it must follow, the remaining defendants in the suit have no cause of complaint.

Fourth—That the intention of the parties, as expressed when the arrangement was made and proved by the witnesses, must be taken to qualify the agreement, and thus establish its true character, and we believe it was merely to decline to prosecute further the defendants who were dismissed, and nothing more.

Neither do the facts we have alluded to prove an accord and satisfaction, as it must be admitted, if they did, it would have the same effect as a technical release, nor do they contain the ordinary elements of what the law regards as necessary to constitute such a bar. We have been specially referred to the case of *Ellis v. Bützer*, already quoted to change or greatly modify the rule we have stated, but it does not, we think, conflict with the leading principle which we suppose governs all similar cases. The courts do not there assume any new rule of interpretation, or attempt to extend the operation of that which has hitherto been received, and acted on in the trial of causes, and we find nothing inconsistent therefore, with the conclusion to which we have arrived.

Nor do we doubt, although there may be found individual judgments against joint trespassers, the plaintiff can have but one satisfaction; he must elect which of the judgments he will enforce, on the same principle, where there may be different findings by the same verdict when all the trespassers are sued, the successful party must choose "*de melioribus damnis*"—he cannot claim to collect all. It follows, then if the damages are satisfied in part, by payment, or compromise with some of the defendants, the plaintiff may still proceed against those who remain on the record, and we hold it was the duty of the judge who tried the cause at Special Term, to have instructed the jury, as he did, to deduct in their finding whatever sum the plaintiff has already received on account of his alleged injuries, from the parties who were afterwards dismissed. This was the just application of the

rule that there cannot be a double remuneration for the same wrong.

This is very distinctly stated by Judge UPHAM in *Snow v. Chandler*, 10 N. H. 95. It is, he says, that "the sum paid was not received in satisfaction of the damages, but only in part satisfaction, and the fact that it was coupled with an engagement not to sue, does not alter the case. But to the extent of the amount paid, the defendant may avail himself of the arrangement." See also *Merchants' Bank v. Curtis*, 37 Barb. 320.

We have thus traced the principle, familiar as it is, that determines this case to its source, and followed down the course of decisions to the present time, not that there was any novelty in the rule, but that we might satisfactorily determine what in reality was a legal bar to this action, and although the examination of the numerous cases, both ancient and modern, has convinced us that the old maxim, "*Melius est petere fontes, quam sectari rivulos*," has not always been regarded by the courts, we find no difficulty in arriving at the result we have reached. Not only upon the law as we hold it to be, but on the facts proved, we are all of opinion that the motion for a new trial should be overruled, and judgment entered on the verdict.

The foregoing opinion embodies the law so thoroughly, and is upon a question of so much practical importance, that we are glad of an opportunity to present it to the profession. The case turns altogether upon the effect of the *retraxit* or *not. pros.* as to a portion of the defendants. The facts seem to be, that the plaintiff accepted \$1500 of a portion of the defendants, and discontinued the suit against them, under an agreement that they should be no further prosecuted for the trespass, *but that the plaintiff should be at liberty to proceed against the other defendants.* Upon this state of facts the judge at the trial charged the jury, that the transaction did not amount to a bar of the action; but that the amount received must be considered in making up the damages against the other defendants. This seems to us both legal and equitable. It is a creditable illus-

tration and application of the rule, that it is the duty of courts so to construe the contracts of parties as to effect their intention, if practicable.

It was a mere question, to reduce it to its simplest elements, whether what passed between the plaintiff, and the defendants let out of the action, amounted to a release of the *cause of action*, or a covenant *not to sue* these defendants. If the contract had been in writing, it might have been so drawn, through the inexperience of the draughtsman, or possibly through mere inattention, that the court must of necessity treat it as a release. If that is so, the court have no alternative but to say the contract is so defective as to render it impossible for the court to carry into effect the intention of the parties. But so long as it remains in oral evidence it is always easy to escape so disastrous a result.

The case may always be referred to the jury, and they will never experience any difficulty in finding that the parties used such terms as, on the whole, to express their obvious intent. And that, in the present case, is entirely unquestionable.

It is as certain that the plaintiff did not intend to release the cause of action, as that he did intend no further to prosecute the defendants let out of the action. There must, then, be very clear proof of the use of terms, which do, of necessity, release the cause of action, to induce the court to give them that effect, where there is not the slightest doubt, on the whole case such was not

the real purpose. We should always feel more or less compassion for any judge who felt himself so effectually hampered by forms as to be driven into any such absurd consequence. The opinion seems to us creditable, both in form and substance. And we rejoice at this obvious tendency of modern common-law jurisprudence to reach obviously just results, which is the great excellence of an unwritten system of law over one that is cramped into written forms. The one is temporal and imperfect, the other eternal and complete, if wisely and fairly administered. I. F. R.

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*Circuit Court of the United States. District of California.*

GORDON v. SOUTH FORK CANAL COMPANY.

The rule that the title of a purchaser acquired under a judicial sale will be held good, though the judgment be afterwards reversed, applies to all purchasers, whether parties to the suit or not.

By a decree of the Circuit Court, a claim was held to be a lien on an entire canal. From this decree an appeal was taken to the Supreme Court, pending which the canal was sold under the decree, and the plaintiff in the decree became the purchaser. The Supreme Court reversed the decree on the ground that the claim was a lien on a section of the canal only. *Held*, that plaintiff's title under the sale was not affected by the reversal.

COMPLAINANT filed a bill in the Circuit Court to enforce a claim for work and materials used in the construction of certain sections of defendants' canal. The court at June Term 1865, entered a decree for complainant for \$76,000, declaring it a lien on the entire canal, which was ordered to be sold by a master. The sale took place in November 1865 to the assignee of the decree, and was duly confirmed by the court and a conveyance made by the master. In October 1865, an appeal was taken to the Supreme Court, but no bond filed for *supersedeas* or stay of proceedings. In March 1868, the Supreme Court reversed the decree so far as it declared the claim a lien on the entire canal, adjudging the lien to cover only the sections upon which plaintiff's work was done,



and remanding the cause to the Circuit Court with directions to enter a decree in conformity with its opinion.

The defendants filed the mandate and asked not only obedience to its commands but also that the sale made under the decree reversed be set aside, and the property sold be restored to them. The purchaser at the master's sale and his vendee appeared in opposition to the latter application.

Opinion by

FIELD, Circuit Judge.—Obedience to the mandate of the Supreme Court will always be rendered by this court, as is its duty. It will be a prompt and implicit obedience; but we trust it will be, as it is intended it should be, an intelligent, not a blind obedience. The judgments of that tribunal are based upon the records before it, and these judgments will be unhesitatingly enforced, except as their enforcement may be modified or restrained by events occurring subsequent to the period covered by the records. That such events may modify, and often do modify, the mode and manner of enforcement is well known to all members of the profession. The death of parties, partial satisfaction, changes of interest subsequent to judgment, and sales upon the judgment pending the appeal, are instances where this result is frequently produced.

The decree which this court will enter under the mandate of the Supreme Court will, like the previous decree, adjudge, as the amount due, the sum reported by the master, with interest; but it will declare that it is a lien only upon that portion of the canal which is embraced between sections 17 and 25 inclusive, which were constructed by the complainant. Whether it will go further, and order the enforcement of such lien by directing a sale of the particular sections, will depend upon the effect of the reversal of the decree upon the previous sale; and this brings us to the second part of the defendants' motion.

There is some contradiction in the adjudged cases as to the effect of the reversal of a judgment or decree upon rights acquired under it. This contradiction has arisen principally, if not entirely, from not distinguishing between the effect of the reversal upon the rights of the parties with respect to the subject-matter in controversy, and its effect upon rights acquired on proceedings taken for its enforcement; and yet the difference in the operation of the

reversal in the two cases is obvious, and need only be stated to be recognised.

For instance, it is adjudged that the defendant is indebted to the plaintiff in a certain sum of money, and that the plaintiff recover the same. Here the operation of the judgment is to determine the fact of indebtedness, as well as to authorize the use of the means provided by law for its collection. The reversal of the judgment changes the entire relation of the parties; it recalls the affirmation of indebtedness, and denies its existence. If such supposed indebtedness has been collected whilst the judgment remained in force, the reversal necessarily requires that restitution should be made.

On the other hand, if whilst the judgment remains unreversed proceedings are taken for its enforcement, and property of the defendant is sold under them, the purchaser acquires a good title. The judgment being valid, and its enforcement not being stayed, all persons relying upon it are protected, for it is a general principle that a judgment rendered by a court having jurisdiction of the parties and subject-matter, however erroneous, is, until reversed, as efficacious for all purposes as though approved by the highest tribunal of the land. To the errors which the court may have committed in its rendition, persons trusting to its protection need pay no attention. Were it not so, the judgment would be of no avail to the successful party until it has been approved by the highest appellate tribunal, or until the time to appeal has expired. The doctrine in this respect is well expressed in *Gray v. Brignardello*, 1 Wall. 627. In that case it appeared that certain real property had been ordered sold by one of the District Courts of California in a suit brought to settle up an alleged copartnership between certain parties, one of whom had died intestate. The court adjudged that a copartnership had existed between the parties named, and that the real property in question belonged to such copartnership, and directed its sale. The property was accordingly sold. Subsequently the Supreme Court of the state reversed the decree, holding that the alleged copartnership was not established by the proofs. The heirs of the deceased party then brought ejectment in the Circuit Court of the United States for parcels of the property sold. In that court and in the Supreme Court, where the case was subsequently carried, it was contended by their counsel that the decree authorizing the

sale having been reversed, the sale fell with it, but the court in reply said: "It is a well-settled principle of law that the decree or judgment of a court which has jurisdiction of the person and subject-matter is binding until reversed, and cannot be collaterally attacked. The court may have mistaken the law or misjudged the facts, but its adjudication, when made, concludes all the world until set aside by the proper appellate tribunal. And, although the judgment or decree may be reversed, yet all rights acquired at a judicial sale while the decree or judgment was in full force, and which it authorized, will be protected. It is sufficient for the buyer to know that the court had jurisdiction, and exercised it, and that the order on the faith of which he purchased was made, and authorized the sale. With the errors of the court he has no concern."

But whilst this doctrine is admitted to be in general correct, it was contended on the argument that it applied only to strangers to the judgment or decree, and did not extend to parties or their privies. And expressions were cited from opinions of different judges, to the effect that by the reversal the defendant or unsuccessful party in the court below is to be restored to all things which he lost by the erroneous judgment or decree, and that protection is afforded to strangers at judicial sales in order to encourage bidding. Expressions of this kind may be very just and appropriate in connection with the particular facts of the special cases in which they are used; but they do not express a rule applicable in all cases, or furnish the true reason for the protection extended to purchasers at judicial sales. The principle that the defendant or unsuccessful party in the court below is to be restored to *all things* which he lost by the erroneous judgment or decree can not apply to those things the title of which may be transferred by proceedings taken for the enforcement of the judgment or decree when its enforcement is not stayed pending the appeal. The restoration in specie in such cases being impossible without infraction of the principle by which judgments of courts are upheld and enforced, it follows that the right which the reversal gives must be that of action to recover an equivalent for the lost thing. And perhaps the rule may be stated thus: That the defendant or unsuccessful party in the court below is to be restored, by reversal, to all things which he lost by the erroneous judgment or decree, if the title to them has not passed by the

previous enforcement of the judgment or decree, and in such case he is to have a right of action for a money equivalent. And the rule as thus stated would leave the parties to take advantage of the proceedings for the enforcement equally with third persons. There is no reason why they should not have the same protection extended to them as to strangers. The judgment or decree is equally binding upon all, and should be equally efficacious for protection. When the judgment or decree directs a sale of property of the defendant, it may be regarded as a power of attorney to the officer charged with its execution created by the law, and, like any other power, sufficient to give validity to the acts of the officer until the power is revoked by the reversal. There is no prohibition in the law, or objection in the reason of the thing, against a party taking advantage of the proceedings had for the enforcement of the judgment which he has recovered. Strangers are protected, not because a contrary rule would discourage bidding, but because they have a right to rely upon the validity of the judgment and invoke its protection for all acts done under it whilst it is in force, and for the rights they have acquired thereby. That the rule also has the effect of encouraging bidders at the sale is evidence of its wisdom, but is not the reason of its establishment. In *Parker's Heirs v. Anderson's Heirs*, 5 T. B. Monroe 445, real property belonging to one Parker had been sold under a decree of a court of equity which was subsequently reversed. At the sale one Anderson became the purchaser, and after reversal, in a suit brought by the heirs of Parker against the heirs of Anderson, the court below refused to compel a surrender of the title of the property. The Court of Appeals of Kentucky, where the case was taken, held the ruling correct.

"The decree," said that court, "under which both the legal and equitable title was derived, it is true has since been reversed by the decision of this court; but neither from analogy to legal proceedings, nor the principles and usages of equity, can the reversal of the decree under which the lot was sold and the title conveyed authorize a court of chancery to decree a reconveyance of the title so obtained. The doctrine is well settled at law, that estate sold under a writ of *fiery facias* will be retained by the purchaser, though the judgment upon which the execution issued may be afterwards reversed; and the rule is the same in equity, where land is sold under the decree of a court of equity and the decree

is afterwards reversed. After the reversal of a judgment at law, or the decree of a court of equity, the person prejudiced by the decree is entitled to the proceeds of the estate sold, either under execution upon the judgment, or in obedience to the judgment, or in obedience to the decree; and it would, no doubt, be competent for a court of law or equity to compel restitution of the money for which the estate sold. But both law and equity guard, with great circumspection, the interest derived by purchasers under the processes of courts of law, or the decrees of courts of equity; and unless there be unfairness in the transaction, the title which the purchaser acquires, either by the sale of an officer acting under a *feri facias* at law, or the sale of a commissioner acting under the decree of a court of equity, will never, upon the reversal of a judgment or decree, be disturbed.

"The rule was, in argument, admitted to be, in the general, correct; but it was attempted to limit its application to purchasers who are neither parties nor privies to the judgment or decree under which the sale is made. The reason for such a limitation of the principle is not, however, perceived by us, and we have met with no adjudged case, either at law or equity, wherein any such exception to the rule has been made. The parties to a judgment or decree are, equally with all others, at liberty to bid and purchase property exposed for sale under the authority of a judgment or decree, and there is the same reason for protecting the interest acquired by a party under a purchase as that of a stranger."

With the views thus forcibly expressed we fully concur.

The only case which at all conflicts with it to which we have been referred, is that of *Reynolds v. Harris*, decided by the Supreme Court of this state: 14 Cal. 667. The circumstances of that case are peculiar. Separate parcels of real property, consisting of mining canals and ditches, had been mortgaged by different parties to secure the same indebtedness. The decree of foreclosure directed the sale of the property upon terms variant from those prescribed by the statute, and in such a manner as to defeat the right allowed by the law of the state of some of the mortgagees to redeem the separate parcels mortgaged by them.

At the sale the mortgagee and complainant in the foreclosure purchased the entire property—two of the parcels mortgaged being struck off together upon one bid—and received the officer's certificate of the sale—a certificate which would entitle him to a

deed at the end of six months, if no redemption were made in the meantime; but which redemption from the manner of sale was impossible with reference to one of the parcels. The amount to be paid to redeem the separate parcels could not be ascertained, as they were sold together. The certificate of sale and the decree were subsequently assigned to Harris. Afterwards the decree was reversed so far as it directed the sale, and on petition of defendants the sale was set aside, and the credit allowed for the amount bid vacated.

It will be thus seen that the sale was not perfected when the proceedings were set aside, and upon this fact, together with the departure in the sale from the directions of the statute, the action of the court may be sustained. But there is much in the opinion which we think requires qualification, but which, without qualification, we are satisfied, from the extended examination we have given to the authorities, is unsupported by any well-considered adjudication. We find no case which draws the distinction there taken between parties and strangers, and makes the upholding of a judicial sale, after reversal of the judgment or decree under which it was made, depend upon the character of the purchaser.

If now we test the question presented by the application before us, we shall find it one of easy solution. This court, in rendering its decree of September 1865, had jurisdiction of the parties and of the subject-matter. It passed upon the amount of indebtedness of the South Fork Canal Company to the complainant, upon the existence of the lien asserted, and its extent. It adjudged that the lien extended to the entire flume and canal, and it decreed the sale of the property in case payment of the complainant's demand was not made by a day designated. The payment was not made and the sale took place, the master following in all particulars the direction of the decree. His report of his proceedings was not excepted to and was confirmed. The complainant was mentioned in the decree as a possible bidder, and provision made for crediting his bid on the amount adjudged due to him. The master reported that the assignee of the complainant, Hosmer, became the purchaser, and when the report was confirmed the master was directed to execute to him a deed of the property. If Hosmer and his grantee cannot under these circumstances trust to the title thus acquired, it is difficult to imagine any case of judicial sale which may not be vacated upon a subsequent reversal of the judg-

ment or decree under which it is had. We are clear that the purchaser took a title to the premises which cannot be disturbed. That part of the motion, therefore, which asked that the sale be set aside, and the property sold restored to the defendants, is denied; and the decree to be entered on the mandate of the Supreme Court will contain the provisions already mentioned, without directing the enforcement of the lien upon the sections named.

The defendants are entitled to have the costs incurred by them in the Supreme Court credited to the amount found by the master as due the complainant.

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*Circuit Court of the United States for the Southern District of  
New York.*

AUGUSTIN DALY v. HENRY D. PALMER AND HENRY C.  
JARRETT.<sup>1</sup>

The term "dramatic composition" in the copyright acts includes all manner of compositions in which the story is represented by dialogue or action instead of narrative, and a scene or composition in which the author's ideas are conveyed by action alone, is within the term.

A dramatic scene or incident in which the ideas are expressed by action alone, or by action and dialogue combined, is within the acts, and the copyright is infringed by another scene in which the same dramatic effect is produced by the same ideas in substantially the same order and arrangement, though the characters may be changed and the portions represented by action in one may be represented by spoken words in the other.

Stage directions, and the order of representation of events in accordance therewith, are the subject of copyright.

A piracy is committed if the meritorious part of the composition is incorporated in another work without material alteration in the constituent parts or in the sequence of events in the series. And the change of characters in a dramatic scene from male to female, the transfer of the scene to an underground place of confinement, the use of different instruments of release, &c., the chief ideas and their sequence remaining the same, are not material alterations.

Where two dramatic scenes are substantially alike, and the charge of plagiarism is made in a bill by the author of one to restrain infringement of copyright, and not denied by defendant's answer, the validity of the copyright is not impaired by showing that the incidents of which the scene was composed were all known and

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<sup>1</sup> We are indebted for this novel and interesting case to the courtesy of Judge BLATCHFORD.—EDS. AM. LAW REG.

in common use before the complainant's play was composed, and that a story had been previously published in which the incidents had been related in similar order.

The representation of a part of a play is an infringement of copyright.

The sale, with a view to public representation, of a play which infringes the copyright of another, makes the seller a participant in causing the play to be publicly represented, and an injunction will be granted against the sale.

*Thomas S. Alexander and William Tracy*, for the plaintiff.

*William D. Booth and T. W. Clarke*, of Boston, for the defendants.

BLATCHFORD, J.—This is an application for a provisional injunction to restrain the defendants from the public performance and representation, and from the sale for dramatic representation, of a scene called the "railroad scene" in a play called "After Dark." The plaintiff is by profession a dramatic author, his business being to compose, write and produce on the theatrical stage dramatic compositions, commonly called plays. The defendants are the managers of a public place of theatrical amusement, in the city of New York, called Niblo's Garden. Before the 1st of August 1867, the plaintiff composed and wrote a dramatic composition called "Under the Gaslight," and on that day he took the proper steps to secure to himself a copyright for the composition, under the provisions of the Act of February 3d 1831 (4 U. S. Stat. at Large 436), by depositing before publication a printed copy of the title of the composition as author and proprietor, in the Clerk's office of the District Court of the Southern District of New York, where he resided at the time. The composition was afterward printed and published, and within three months from its publication he caused a copy of it, as printed and published, to be delivered to said clerk. He also gave information of copyright being secured by causing to be printed and inserted in the several copies published the words prescribed by the fifth section of the act.

The Act of 1831 confers upon the author and proprietor of a dramatic composition, duly copyrighted, the sole right and liberty of printing, reprinting, publishing, and vending such composition, in whole or in part, for the term of twenty-eight years from the time of recording the title of such composition, in the manner directed by the act. The Act of August 18th 1856 (11 U. S. Stat. at Large 138), provides that any copyright thereafter granted under the laws of the United States "to the author or proprietor of any dramatic composition, designed or suited for public repre-



sensation, shall be deemed and taken to confer upon the said author or proprietor, his heirs and assigns, along with the sole right to print and publish the said composition, the sole right also to act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place during the whole period for which the copyright is obtained."

The bill alleges that the plaintiff's play was designed and suited for public representation; that it was represented for the first time on the 12th of August 1867, under his direction, and for his benefit, at the New York Theatre, a public place of theatrical amusement in New York, and was thenceforward represented there for eight consecutive weeks; that it met with great success, attracted crowds of persons, and was pecuniarily profitable to the plaintiff to a large amount; that the particular cause of such success was what was commonly called, after such public performance, the "railroad scene" at the end of the third scene of the fourth act, in which one of the characters is represented as secured by another, and laid helpless upon the rails of a railroad track in such manner, and with the presumed intent, that the railroad train, momentarily expected, shall run him down and kill him, and just at the moment when such a fate seems inevitable another of the characters contrives to reach the intended victim, and to drag him from the track as the train rushes in and passes over the spot; that this incident and scene was entirely novel and unlike any dramatic incident known to have been theretofore represented on any stage, or invented by any author, before the plaintiff so composed, produced, and represented the same; that the playing of said composition and scene caused the same to become famous in all parts of the United States and Canada and in England; that the chief value of the composition and its popularity depend upon said "railroad scene;" that it was repeatedly produced and represented by and for the advantage of the plaintiff in many cities and towns of the United States and Canada, to the profit of the plaintiff; that before learning of the alleged wrongs mentioned in the bill attempted by the defendants, the plaintiff had made arrangements for representing the play dramatically at New York and in various places in the United States during the present winter and the approaching spring; that he accordingly commenced to represent the play at the New York Theatre, in the city of New York, on the 4th of November, 1868; that soon after the production,

representation, and printing of the play in the United States, one Dion Boucicault, a dramatic author and actor and theatrical manager, a subject of Great Britain, residing in England, procured a copy of said play by some means, and, without the knowledge or consent of the plaintiff, prepared therefrom a play, which he called "After Dark," in which play he introduced several of the scenes and incidents of the plaintiff's play, varying them slightly, but following in them the invention and plan of the plaintiff's play, in a manner which was intended to differ from it only slightly, so as colorably to be a different work, while substantially retaining the attractive features of the plaintiff's play, and which contained, with only colorable variations, the said "railroad scene" of the plaintiff's play, substituting for the surface railroad an underground railroad, for the rescuer of the victim to be killed on the railroad a man for a woman, for the railroad station in which the rescuer was confined a cellar, and for the breaking down a door to escape and rescue the victim, the breaking down a wall or the door in a wall; that the work of Boucicault is a palpable imitation of the plaintiff's said "railroad scene," and is plagiarized therefrom and put into the play called "After Dark," by Boucicault, for the purpose of obtaining the pecuniary benefit which might otherwise result to the plaintiff from the representation of his play; that the play of "After Dark" was performed in England without the plaintiff's consent, to the great profit of Boucicault, and was indebted for its success and profit to such imitation of said "railroad scene;" that Boucicault has sent copies of his play containing such plagiarism of said "railroad scene" to the defendants in the United States, for sale and performance for his own profit, and several copies of it are in the defendants' possession; that the defendants are intending, and have announced their purpose, to perform such play called "After Dark" publicly on the stage, at Niblo's Garden, in New York, on the 16th of November 1868, and every night thereafter till further notice, without the consent of the plaintiff; that such play and the plagiarism of said "railroad scene" are being rehearsed at Niblo's Garden, under the direction of the defendants, with a view to such public performance thereof; and that the defendant Palmer, acting for Boucicault, is about to sell copies of the play called "After Dark," with said plagiarized scene, to other persons in the United States, to be publicly represented. The bill prays for an injunction to

restrain the defendants from the public representation, and from the sale for dramatic representation of the said "railroad scene" in "After Dark."

The defence to the application on the facts is confined to showing by affidavits that the following matters were known prior to the taking out by the plaintiff of his copyright, namely, the representation on a stage of a train of cars drawn by a locomotive engine on a railroad; a like representation, wherein the train appeared to run over a man lying on the track; and a like representation, wherein the train appeared to run over a man lying on the track, who had been thrown thereon in a helpless condition by another of the characters, in order that he might be run over and killed. A story called "Captain Tom's Fright," in the *Galaxy* for March 15th 1867, is also adduced to affect the validity of the plaintiff's copyright. There is no answer to the bill, nor is there any denial of the allegations that Boucicault procured a copy of the plaintiff's play and prepared therefrom the "railroad scene" in the play of "After Dark," and intended that the latter should only be colorably different from the "railroad scene" in the plaintiff's play, by making the substitutions before mentioned, and that the "railroad scene" in the play of "After Dark" was plagiarized by Boucicault from the "railroad scene" in the plaintiff's play.

In the plaintiff's play there is a surface railroad, with a railroad station and a signal station shed or store-room. A signal-man appears, and a woman named Laura. At the request of Laura, the signal-man locks her in the shed. There are some axes in it. One Snorkey then appears. The signal-man then goes off. One Byke then enters with a coil of rope in his hand, and throws it over Snorkey, and tightens it around his arm, and coils it around his legs, and then lays him across the track and fastens him to the rails, and goes off, having by language given it to be understood that the intention is that Snorkey shall be run over by the train and killed. Laura, from a window in the shed, sees what is done. The steam whistle of the train is heard. She takes an axe and strikes the door. The whistle is heard again, with the rumble of the approaching train. She gives more blows on the door with the axe. It opens. She runs and unfastens Snorkey. The lights of the engine appear, and she moves Snorkey's head from the track as the train rushes past. This incident occupies the whole

of the third scene of the fourth act. There is a good deal of conversation, first between the signal-man and Laura, and then between Snorkey and the signal-man, and then between Byke and Snorkey, and then between Laura and Snorkey. There are stage directions for Laura to go into the shed; for the signal-man to lock her in; for Snorkey to enter; for the signal-man to go off; for Byke to enter with the coil of rope; for Byke to throw the coil over Snorkey, and tighten the rope around Snorkey's arm, and coil it around his legs; for Byke to lay Snorkey across the track, and fasten him to the rails; for Byke to go off; for the steam whistle to be heard; for blows on the door to be heard; for the steam whistle to be heard again, with the rumble of the train; for more blows on the door to be heard; for the door to open; for Laura to appear with the axe in her hand; for her to run and unfasten Snorkey; for the lights of the engine to be seen; for Laura to take Snorkey's head from the track; and for the train to rush past. These stage directions are separate and apart from the conversation, and are in italics, and in parentheses, at the appropriate places in the progress of the scene. The substance and purport of the successive conversations in the scene are, that Laura requests the signal-man to lock her in the shed and he consents; that Snorkey requests the signal-man to stop by signal the expected train and he refuses; that Byke gives Snorkey to understand that he is to be run over and killed by the train; and that Snorkey requests Laura to break down the door and release him. The idea is also conveyed by the language in the scene, that Byke is about to commit robbery and murder at Laura's house, and that Snorkey is trying to give information of the fact.

In the play of "After Dark" the "railroad scene" is in the third act. In the first scene of that act one Gordon Chumley is rendered insensible by drugs, and one Old Tom is thrown by force into a wine vault. In the second scene of that act Old Tom is represented as in the vault. There is an orifice in the vault which opens upon the track of an underground railroad. The rumbling of cars is heard, and lights flash through the orifice. Old Tom, through a door into an adjoining vault, sees two of the characters carry Chumley and break a hole through a wall and pass the body of Chumley through the hole, as he supposes, for concealment in a well or vault. Old Tom then finds an iron bar, and resolves to attempt escape by enlarging the orifice in the wall

opening on the railroad. Then follows scene third. The railroad is seen, with a circular orifice which ventilates the cellar in which Old Tom is. The body of Chumley is seen lying across the rails, and the arm of Old Tom, and then his head, are passed through the orifice. For this much of the scene there are only stage directions without spoken words. The following is a *verbatim* copy of the rest of the scene, the parts in parentheses being stage directions: "Old Tom.—About four courses of bricks will leave me room to pass. What is that on the line? There is something surely there. (A distant telegraph alarm rings, the semaphore levers play, and the lamps revolve.) Great Heaven! 'tis Gordon. I see his pale, upturned face—he lives! Gordon! Gordon! I'm here! He does not answer me. (A whistle is heard and distant train passes.) Ah! murderers. I see their plan. They have dragged his insensible body to that place and left him there to be killed by a passing train. Demons! Wretches! (He works madly at the orifice. The bricks fall under his blows. The orifice increases. He tries to struggle through it.) Not yet. Not yet. (The alarm rings again. The levers in the front play. The red light burns and a white light is turned to L. H. Tunnel. The wheels of an approaching train are heard.) Oh, Heaven! give me strength—down—down. One moment! (A large piece of wall falls in and Old Tom comes with it.) See, it comes, the monster comes. (A loud rumbling and crashing sound is heard. He tries to move Gordon, but seeing the locomotive close on him, he flings himself on the body and clasping it in his arms, rolls over with it forward. A locomotive, followed by a train of carriages, rushes over the place, and as it disappears Old Tom frees himself from Chumley and gazes after the train.)" The play of "After Dark" has never been published by Boucicault, although printed by him for private use.

The first inquiry is, what is meant in the Act of 1856 by a "dramatic composition," what is meant by the "public representation" of a dramatic composition, and what is meant by the right to "act, perform, or represent" a dramatic composition on "a stage or public place." The Act of 1856 confers on the author or proprietor of a copyrighted "dramatic composition, designed or suited for public representation," the sole right of acting, performing, or representing the same on a stage or public place, in addition to the sole right to print and publish such composition.

The latter right must be considered as being conferred by the Act of 1831, for, although that act speaks only of a copyright for a "book or books, map, chart, musical composition, print, cut, or engraving," yet, under the language of the Act of 1856, a "dramatic composition, designed or suited for public representation," must be regarded as embraced within the Act of 1831.

A composition in the sense in which that word is used in the Act of 1856, is a written or literary work invented and set in order. A dramatic composition is such a work in which the narrative is not related, but is represented by dialogue and action. When a dramatic composition is represented, in dialogue and action, by persons who represent it as real, by performing or going through with the various parts or characters assigned to them severally, the composition is acted, performed, or represented; and if the representation is in public, it is a public representation. To act, in the sense of the statute, is to represent as real, by countenance, voice, or gesture, that which is not real. A character in a play who goes through with a series of events on the stage without speaking, if such be his part in the play, is none the less an actor in it than one who, in addition to motions and gestures, uses his voice. A pantomime is a species of theatrical entertainment in which the whole action is represented by gesticulation without the use of words. A written work consisting wholly of directions set in order for conveying the ideas of the author on a stage or public place by means of characters who represent the narrative wholly by action, is as much a dramatic composition designed or suited for public representation as if language or dialogue were used in it to convey some of the ideas.

The "railroad scene" in the plaintiff's play is undoubtedly a dramatic composition. Those parts of it represented by motion or gesture, without language, are quite as much a dramatic composition as those parts of it which are represented by voice. This is true also of the "railroad scene" in "After Dark." Indeed, on an analysis of the two scenes in the two plays, it is manifest that the most interesting and attractive dramatic effect in each is produced by what is done by movement and gesture entirely irrespective of anything that is spoken. The important dramatic effect in both plays is produced by the movements and gestures which are prescribed and set in order so as to be read, and which are contained within parentheses. The spoken words in each are

of but trifling consequence to the progress of the series of events represented and communicated to the intelligence of the spectator by those parts of the scene which are directed to be represented by movement and gesture. The series of events so represented and communicated by movement and gesture alone to the intelligence of the spectator, according to the directions contained in parentheses in the two plays in question here, embraces the confinement of A. in a receptacle from which there seems to be no feasible means of egress; a railroad track, with the body of B. placed across it in such manner as to involve the apparently certain destruction of his life by a passing train; the appearance of A. at an opening in the receptacle, from which A. can see the body of B.; audible indications that the train is approaching; successful efforts by A. from within the receptacle, by means of an implement found within it, to obtain egress from it upon the track; and the moving of the body of B. by A. from the impending danger, a moment before the train rushes by. In both of the plays the idea is conveyed that B. is placed intentionally on the track, with the purpose of having him killed. Such idea is, in the plaintiff's play, conveyed by the joint medium of language uttered and of movements which are the result of prescribed directions, while in Boucicault's play it is conveyed solely by language uttered. The action, the narrative, the dramatic effect and impression, and the series of events in the two scenes are identical. Both are dramatic compositions designed or suited for public representation. It is true that in one A. is a woman, and in the other A. is a man; that in one A. is confined in a surface railroad station-shed, and in the other A. is confined in a cellar abutting on the track; that in one A. uses an axe, and in the other A. uses an iron bar; that in one A. breaks down a door, and in the other A. enlarges a circular hole; that in one B. is conscious and is fastened to the rails by a rope, and in the other B. is insensible and is not fastened; and that in one there is a good deal of dialogue during the scene, and in the other only a soliloquy by A., and no dialogue. But the two scenes are identical in substance, as written dramatic compositions, in the particulars in which the plaintiff alleges that what he has invented and set in order in the scene has been appropriated by Boucicault.

Nor is this a case of first impression. An arrangement of musical notes, forming a tune or air, is a musical composition, and

the author who has invented it and set it in order and copyrighted it, is entitled to protection. The extent of that protection has been the subject of judicial interpretation. In the case of *D'Almaine v. Boosey*, 1 Younge & Collyer's Exch. R. 288, the plaintiffs, proprietors of the copyright of an opera of Auber's, and also of another copyright of the overture of the same opera, and also of another copyright of the airs of the same opera, filed a bill in equity to restrain the defendant from infringing such copyrights. The defendant had published several of the airs, with some alterations, in the shape of quadrilles and waltzes. It was claimed on the part of the defendant that his work was merely an adaptation of the original, and therefore not a piracy. But the court (Lord Chief Baron LYNTHURST) held that if the defendant had published the original air, though with adaptations and harmonies, or for different instruments, it was a piracy, and that it was not like the case of an abridgment of a book, where the purpose of the abridgment was distinct from that of the work from which it was taken. On this subject the court says: "It is admitted that the defendant has published portions of the opera containing the melodious parts of it; that he has also published entire airs; and that in one of his waltzes he has introduced seventeen bars in succession, containing the whole of the original air, although he adds fifteen other bars which are not to be found in it. Now, it is said that this is not a piracy—first, because the whole of each air has not been taken; and, secondly, because what the plaintiffs purchased was the entire opera, and the opera consists not merely of certain airs and melodies, but of the whole score. But, in the first place, piracy may be of part of an air as well as of the whole; and, in the second place, admitting that the opera consists of the whole score, yet if the plaintiffs were entitled to the whole, *a fortiori*, they were entitled to publish the melodies which form a part. Again, it is said that the present publication is adapted for dancing only, and that some degree of art is needed for the purpose of so adapting it, and that but a small part of the merit belongs to the original composer. That is a nice question. It is a nice question what shall be deemed such a modification of an original work as shall absorb the merit of the original in the new composition. No doubt such a modification may be allowed in some cases, as in that of an abridgment or a digest. Such publications are in their nature original. Their compiler intends to make of them a new



use; not that which the author proposed to make. Digests are of great use to practical men, though not so, comparatively speaking, to students. The same may be said of an abridgment of any study; but it must be a *bonâ fide* abridgment, because if it contains many chapters of the original work, or such as made that work most saleable, the maker of the abridgment commits a piracy. Now it will be said that one author may treat the subject very differently from another who wrote before him. That observation is true in many cases. A man may write upon morals in a manner quite distinct from that of others who preceded him; but the subject of music is to be regarded upon very different principles. It is the air or melody which is the invention of the author, and which may, in such case, be the subject of piracy; and you commit a piracy if, by taking not a single bar but several, you incorporate in the new work that in which the whole meritorious part of the invention consists. \* \* Now it appears to me that if you take from the composition of an author all those bars consecutively which form the entire air or melody without any material alteration, it is a piracy; though, on the other hand, you might take them in a different order, or broken by the intersection of others, like words, in such a manner as should not be a piracy. It must depend on whether the air taken is substantially the same with the original. Now the most unlettered in music can distinguish one song from another, and the mere adaptation of the air, either by changing it to a dance or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same. The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment. Substantially the piracy is, where the appropriated music, though adapted to a different purpose from that of the original, may still be recognised by the ear. The adding variations makes no difference in the principle." An injunction was granted. The views of Lord LYNTHURST in that case were cited and approved by Mr. Justice NELSON in this court in the case of *Jollie v. Jaques*, 1 Blatchf. C. C. R. 618, 625. They are eminently sound and just, and are applicable to the case of a dramatic composition designed for public representation. Such a composition, when represented, excites emotions and imparts impressions not merely through the medium of the ear, as music

does, but through the medium of the eye as well as the ear. Movement, gesture and facial expression, which address the eye only, are as much a part of the dramatic composition as is the spoken language, which addresses the ear only; and that part of the written composition which gives direction for the movement and gesture is as much a part of the composition, and protected by the copyright, as is the language prescribed to be uttered by the characters. And this is entirely irrespective of the set of the stage, or of the machinery or mechanical appliances, or of what is called in the language of the stage, scenery, or the work of the scene painter.

Now, in consonance with the principles laid down by Lord LYNDHURST, the plaintiff is as much entitled to protection in respect to a substantial and material original part of his "railroad scene," as he is in respect to the whole. Under the Act of 1856 construed in connection with the Act of 1831, he is entitled to be protected against piracy in whole or in part, by representation as well as by printing, publishing and vending. Although the Act of 1831, in regard to printing, publishing, and vending, uses the words "in whole or in part," and the Act of 1856, in regard to representing, does not use those words, yet the Act of 1856, by referring, as it does, to the right conferred by the Act of 1831, as the "sole right to print and publish" the copyrighted composition, when such right is, on the face of the Act of 1831, the sole right to print and publish "in whole or in part," and by then conferring "the sole right also to act, perform, or represent the same, or cause it to be acted, performed, or represented on any stage or public place," must be held to confer the right to represent in whole or in part. All that is substantial and material in the plaintiff's "railroad scene," has been used by Boucicault, in the same order and sequence of events, and in a manner to convey the same sensations and impressions to those who see it represented, as in the plaintiff's play. Boucicault has indeed adapted the plaintiff's series of events to the story of his play, and in doing so has evinced skill and art, but the same use is made in both plays of the same series of events, to excite, by representation, the same emotions in the same sequence. There is no new use, in the sense of the law, in Boucicault's play, of what is found in the plaintiff's "railroad scene." The "railroad scene" in Boucicault's play contains everything which makes the "railroad scene" in the plaintiff's play attractive as a representation on the stage.

As, in the case of the musical composition, the air is the invention of the author, and a piracy is committed if that in which the whole meritorious part of the invention consists is incorporated in another work, without any material alteration in sequence of bars, so in the case of the dramatic composition, designed or suited for representation, the series of events directed in writing by the author in any particular scene is his invention, and a piracy is committed if that in which the whole merit of the scene consists is incorporated in another work without any material alteration in the constituent parts of the series of events, or in the sequence of the events in the series. The adaptation of such series of events to different characters who use different language from the characters and language in the first play, is like the adaptation of the musical air to a different instrument, or the addition to it of variations or of an accompaniment. The original subject of invention, that which required genius to construct it and set it in order, remains the same in the adaptation. A mere mechanic in dramatic composition can make such adaptation; and it is a piracy if the appropriated series of events, when represented on the stage, although performed by new and different characters using different language, is recognised by the spectator through any of the senses to which the representation is addressed, as conveying substantially the same impressions to, and exciting the same emotions in the mind, in the same sequence or order. Tested by these principles, the "railroad scene" in Boucicault's play is undoubtedly, when acted, performed, or represented on a stage or public place, an invasion and infringement of the copyright of the plaintiff in the "railroad scene" in his play.

The substantial identity between the two scenes would naturally lead to the conclusion that the later one had been adopted from the earlier one. The charge of actual plagiarism on the part of Boucicault made in the bill is not denied. It is hardly possible that the resemblances are accidental, and that the differences are not merely colorable, with a view to disguise the plagiarism. The true test as to whether there is piracy or not is to ascertain whether there is a servile or evasive imitation of the plaintiff's work, or whether there is a *bond fide* original compilation made up from common materials and common sources, with resemblances which are merely accidental, or result from the nature of the subject: *Emerson v. Davies*, 3 Story 768, 793.

Nothing that has been adduced on the part of the defendants affects the validity of the plaintiff's copyright, on the question of the originality and novelty of the "railroad scene" in his play.

The sale of Boucicault's play to other persons, with a view to its public representation, makes the seller a participant in causing the play to be publicly represented.

An injunction must, therefore, issue restraining the defendants from the public performance or representation, and from the sale for public performance or representation, of the "railroad scene" in the play of "After Dark," or of any scene in substance the same as the "railroad scene" in either of the two plays, as such scene is herein defined.

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*Court of Chancery of Delaware.*

WHARTON ET AL. v. CLEMENTS ET AL.

A partner with the knowledge of his copartner converted to the use of the firm money received by him as a United States deputy collector of internal revenue. *Held*, that a bond of the firm given to indemnify the sureties of the deputy collector was valid as a partnership obligation.

Such bond valid as an indemnity although executed before the sureties had made good the defalcation, and although in form it was a bond for the payment of money.

THE material facts in this case were these:—John F. Clements, a United States deputy collector of internal revenue, converted the public revenue collected by him to the use of the firm of J. F. Clements & Co., of which he was a member. This was done with the knowledge and concurrence of his copartner. The firm becoming insolvent, Clements and his copartner executed their joint obligation to indemnify the defendants as sureties in Clements's official bond. The obligation so given was an absolute bond for the payment of \$500, with a warrant of attorney for the confession of judgment annexed. Judgment was confessed upon the bond and execution issued, under which the partnership goods were levied upon and sold. The complainants, certain simple-contract creditors of the firm, then filed this bill to restrain the sheriff from paying to the sureties the proceeds of their execution, praying that the fund might be held in order to meet their claims when

prosecuted to judgment. They had since obtained judgments for their respective claims.

At the time of the execution of the indemnifying bond the sureties of Clements had sustained no damage, but since the goods were sold under their execution, and in fact since this bill was filed, they had under legal process made good to the United States collector Clements's defalcation to an amount exceeding the fund in the sheriff's hands. Whether they were entitled to take the proceeds of their execution, or whether these proceeds should be held applicable to the judgments of the complainants as creditors of the firm, was the question in controversy.

*E. S. Reed*, for the complainants.

*J. Alexander Fulton*, for the defendants.

BATES, Chancellor.—This bill contests the validity of a judgment confessed by the firm of J. F. Clements & Co., to indemnify the defendants, who were sureties of Clements as deputy collector of internal revenue, against such loss as might accrue to them from his conversion of the public revenue to the use of the firm. The objection taken in argument is that the judgment was without consideration to the firm of J. F. Clements & Co., and was void as against the partnership creditors. That it was without consideration has been urged on the ground that the firm did not, by receiving and using the money collected by Clements and for the due application of which the sureties were bound, incur any partnership debt or liability to the sureties, forming a consideration for the bond; that, on the contrary, the firm as it received the money from Clements became debtor to him alone; that the only remedy of the sureties was against Clements; that between the firm and the sureties there was no privity.

The fallacy of this objection lies in its assuming that the public revenue converted to the use of the partnership was the money of Clements; as if he had *borrowed* a sum of money on his own credit and put it into the business; in which case, unquestionably, the firm would have been indebted to him only, and not to the person from whom he borrowed. So, if the collection of the public revenue were farmed out to a collector, who, paying to the Government a stipulated sum, should become entitled to collect the taxes for his reimbursement; in such case, the taxes when col-

lected would be his own property, and if put into the business of a partnership of which he might be a member, would create no liability on the part of the firm except to himself. But in the present case, the money used by J. F. Clements & Co. was in Clements's hands, as the mere agent of the Collector of Internal Revenue, *whose money it was*, that is, as between the collector and Clements, though ultimately it was payable to the United States Government. It was a trust fund. Now it is a rule, that the rights of a *cestui que trust* adhere to the trust property or fund, and follow it, into whosoever hands it may come, except those of a *bond fide* purchaser for value and without notice. It was forcibly said by Lord ELLENBOROUGH, that "an abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him:" 3 M. & S. 574. If the subject-matter of the trust be lands or chattels, such as can be identified, they may be followed and recovered *in specie*; if it be money, that is, converted by the trustee, whoever receives it with knowledge of the trust, or without a valuable consideration, becomes a debtor to the *cestui que trust*. Or, if the money has been used in the purchase of property, say of lands, the *cestui que trust* may at his election either take the property (2 Dyer 160, 1 Amb. 409), or he may follow the money into the hands of the vendor, holding the vendor as his debtor. This is a settled rule, founded upon the most obvious necessity, that of preventing the facilities there would otherwise be given for the fraudulent conversion of trust property. The rule is enforced at law whenever the circumstances raise a legal cause of action. In courts of equity, relief is given universally. It is one of the various applications of the equitable doctrine of implied trusts: See at large 2 Story's Eq. Jur., §§ 1257-8; Lewin on Trusts (201-2), 24 Law Lib.; *Oliver v. Pratt*, 3 How. S. C. Rep. 338. Among the cases to which this rule has been applied, there are some in which the party receiving trust-money, knowing it to be such, has been held liable as a debtor directly to the *cestui que trust*. Some of these may be noticed.

In *Smith v. Jameson*, 5 T. R. 601, Robert Jameson, while a partner in business with Thomas Jameson, was also one of the assignees in bankruptcy of Lewis and Potter. As assignee of the bankrupt he received 2563*l.*, which he brought into his partnership with the privity of his partner Thomas Jameson. The part-

nership was dissolved, and all its effects and credits assigned to Robert, he assuming the debts. After this a commission of bankruptcy issued against Robert and Thomas Jameson, and Robert was removed as one of the assignees of Lewis & Potter. His co-assignees then claimed to prove the 2563*l.* against the estate of Robert and Thomas Jameson under the commission of bankruptcy against them. The Lord Chancellor directed this action at law to try the question whether the assignees of Lewis & Potter could maintain an action against the partnership of Robert and Thomas Jameson for the sums received by Robert as assignee of Lewis & Potter's estate, and appropriated by him to his own partnership. It was *admitted* that the partners by receiving the money *became indebted to the estate of Lewis & Potter*, but insisted that the assignment of the partnership effects by Thomas Jameson to Robert, while the latter continued to be an assignee of Lewis & Potter, was a discharge. This objection the court overruled, and the assignee recovered.

In *Stone v. Marsh*, 13 Eng. Com. Law 249, one of several trustees of stock under a will, by means of a forged power of attorney sold the stock, and the proceeds were carried into the business of a firm of which he was a partner. Upon an issue out of Chancery to inquire whether the partnership which received the money was indebted for it to the trustees, it was so held by Lord TENTERDEN, who also seems to have considered it immaterial whether or not the other partners were ignorant of the fraud.

In *Hutchinson v. Smith*, 7 Paige 26, one Smith, the treasurer of Monroe county, commencing business in January 1827, used money in his hands as county treasurer in the purchase of a stock of goods. Soon afterwards he took into partnership with him Phelps, whose interest in the stock and business it was agreed should be estimated from January. Phelps entered the firm, knowing that the county funds had been put into the business. In July Smith died. The firm was then, as it was afterwards ascertained, insolvent. Phelps, the surviving partner, assigned all the partnership property to a creditor for the payment of the debts, preferring some; and among other preferred debts was the obligation to the county, which was included at the instance of the sureties on the treasurer's bond. The funds assigned proving insufficient to pay all the debts of the firm, the non-preferred creditors filed their bill to set aside the assignment, and, among

other grounds, objected that the debt due to the county was the private debt of Smith, for which the partnership was not liable. But the Vice-Chancellor, and on appeal the Chancellor, held it to be a partnership debt, and properly provided for by the assignment.

In *Richardson v. French*, 4 Metc. 577, the same principle was applied to the case of a partnership, into which one of the partners, being also an administrator, brought funds from the estate of his intestate. See further, Collyer on Partn., § 391, and cases cited.

We see, then, that the firm of J. F. Clements & Co., by using, with the knowledge of both partners, the funds held by Clements as deputy collector, became debtors to the United States collector. A bond of the firm securing the money to *him* would have been unquestionably valid as a partnership obligation. Next, we inquire how stood the sureties? Did there arise out of this transaction any liability on the part of the firm to them, forming a sufficient consideration for this judgment? Now, had the sureties before taking the judgment (as they have since done), made good to the United States collector Clements's defalcation, they would have succeeded in equity to the exact position of the collector before stated as a creditor of the firm. In equity, sureties, upon payment of the debt or performance of the duty of their principal, are subrogated to all rights, securities, and remedies of the creditor as means of indemnifying themselves, except only that under the English decisions, sureties paying the debt cannot take an assignment of the instrument upon which they are bound; which right, however, is conceded to them under the American decisions, and in this state it is given by statute: Rev. Code, chap. 65. But when this judgment was confessed the sureties had paid nothing, and whether, in fact, they would sustain any loss was contingent until the collector should elect to take his remedy against them rather than against Clements or the firm. Could they in that position take a bond of indemnity? And, if any, could they take an absolute bond for the payment of money, such as the bond upon which this judgment was confessed? There can be no doubt on these points. By force of the defalcation alone and before any payment was made by the sureties, *their* liability to pay became fixed, although whether this liability would be enforced might for a time remain uncertain. So also the firm of J. F.



Clements & Co., by the very act of converting to its own use the trust funds for which the sureties were bound, incurred a liability directly to the sureties; a liability, first, to answer to them in the event of their loss, according to the equitable doctrine of subrogation, in the same manner and to the same extent in which they stood responsible to the collector; and, second (as it seems to be now settled), even before any loss had accrued to the sureties, the firm might have been brought into a court of equity and compelled to exonerate the sureties by paying the debt: 1 Story Eq. Jur., §§ 327, 639, 730; Lord Chancellor in *Nesbit v. Smith*, 2 Bro. C. C. [582] and note (a); *Cox v. Tyson*, 1 Turn. & Russ. 395; *Hays v. Ward*, 4 Johns. Ch. 132; 1 Lead. Cas. in Eq. 87.

Such is the right of a surety as against his principal. The same right these sureties had against J. F. Clements & Co., because the firm, as well as Clements individually, were bound to exonerate the sureties. Thus the firm were, by the very act of using this money, brought under an obligation to indemnify the sureties; not only to make good in the future such loss as might in the event be sustained, but to exonerate the sureties, if so required, at once. Clearly then it was both their right and duty promptly to indemnify the sureties. In what form, we next inquire, might this be done? Might it be by an absolute bond for the payment of a sum of money estimated as sufficient to cover the loss? This was controverted in the argument. But the validity of a money bond as a mode of indemnifying sureties has been affirmed by the Court of Errors and Appeals in *Temnell v. Jefferson*, 5 Harring. 206. There a judgment-bond for \$15,000 had been given by Temnell to certain trustees in trust to apply the proceeds towards indemnifying the sureties of Temnell as administrator of Miers Burton, deceased, and as guardian of his children. The Chancellor (JOHNS) sustained the precise objection here made, that sureties, before actual payment of the debt for which they are bound, cannot take as an indemnity an absolute bond for the payment of money, but only a bond with a collateral condition to indemnify them, upon which judgment might be entered by virtue of a warrant of attorney so as to effect a lien on real estate, but without the power to take execution until the damages should be ascertained through a verdict or an inquisition upon breaches of condition assigned. The Court of Errors and Appeals held the contrary, sustaining the right of the surety to take for his indem-

nty an absolute bond before payment of the money or performance of the duty for which he stood liable; before even the time fixed for payment or performance by the principal had arrived. That decision is conclusive. See also *Toissant v. Martinant*, 2 T. R. 100; *Penney v. Foy*, 8 B. & C. 11 (15 E. C. L. 147).

It results that the judgment confessed by J. F. Clements & Co. to the sureties of Clements is valid as an obligation of the firm, and the defendants are entitled against the partnership creditors to the fruits of their execution.

Bill dismissed, and the injunction dissolved.

NOTE.—There were other questions raised and decided in this case, but they depended upon statute law and were not of sufficiently general interest for publication.

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#### MR. BRADLEY AND THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.—POSTSCRIPT.

IN our March number we had occasion to review the recent controversy between the Supreme Court of the District of Columbia and Mr. Bradley, and to express our opinion very plainly on the conduct of both parties.

Since the publication of that article, we have received a very courteous note from Mr. Bradley, calling attention to some points in the case that we had not previously known, and that modify somewhat the views we have expressed as to his temper in general, and also as to the letter to Judge FISHER of August 6th 1867.

By Mr. Bradley's account, the charge of falsehood made to Judge OLIN on a former occasion was in *retort only* to a charge from the bench that he knew what he was stating to be false. We should be very reluctant to admit any justification for a member of the bar to speak in terms of such flagrant disrespect to a judge on the bench; but if judges so far forget themselves as to engage frequently in angry personal altercations with the bar, we, who practise under a code of judicial ethics of so much higher standard, should be lenient to occasional departures from propriety by less fortunate lawyers.

A far more important matter, however, is the letter to Judge FISHER of August 6th 1867; and concerning this Mr. Bradley

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writes very earnestly that we have misunderstood his language and intention. As this was the gravamen of the case in our remarks, we very cheerfully give Mr. Bradley's own view of it. He says: "But this I can and ought to say, in justice to the gentlemen with whom I conferred, and who were acting with me—not young men, but men of very high standing in the profession, and of high honor and very pure character, that neither of them understood or intended it to be a challenge, and so far from it, the one who was to have acted with me, if my invitation to Judge FISHER had been accepted, was not even to present a challenge if we had met outside the District. My course was perfectly defined in that event, and Judge FISHER and his friends would have had no cause to complain of it. In addition to this, let me say that no gentleman of my acquaintance who has ever had anything to do with such matters has put that construction upon it. They, without exception, say it was an overture which left the case open for future adjustment. Finally the matter was laid before the grand jury of the Criminal Court at a term held by Judge FISHER. He had caused my arrest and had me bound over to appear at that term of the court. Yet, after a full investigation, the grand jury dismissed the complaint."

Viewing the letter in this light, the case was hardly one which called for public comment; and, considering the disclaimer by Mr. Bradley, and the opinions of his friends, the grand jury and the court itself, as expressed by Judge WYLIE, we are disposed to admit that the letter is not so clearly a challenge as to demand the remarks we made upon the crime of offering violence to a judge, though we still think it was unfortunately worded so as most naturally to bear that construction.

The events subsequent to those narrated in our March number may be briefly stated.

On February 1st 1869, Mr. Bradley presented a written apology to the court, which the court, through Judge WYLIE, declared not satisfactory.

We have read this paper since writing the article, and think it a reasonable and fair apology to the court. It does not say in terms that Mr. Bradley was altogether in the wrong, still less that Judge FISHER was entirely in the right, and no one should expect that it would do so; but it does disclaim any intentional

disrespect to the bench, express "profound regret" for any contempt of the court, and ask permission to recall and withdraw any act or expression which might be interpreted as an indignity to the judicial tribunals of the District; and it states, apologetically, that he acted under "sudden impulse and continuous excitement."

It could not be expected that Mr. Bradley should apologize personally to Judge FISHER, whom he considered the original aggressor, but to the *court* the apology was, it seems to us, as fair and ample as any gentleman could be expected to make under the circumstances, and when, after the expressions quoted, he goes on to show that the letter was not a challenge and to define his position upon the rules and orders of the court, objecting even strenuously to the jurisdiction of the court to punish him by *ex post facto* order, we fail to discover anything disrespectful or beyond what a man may fairly do in his own vindication.

On February 6th 1869, Mr. Bradley having announced his intention not to apply to the Criminal Court for restoration to that bar, the Supreme Court of the District applied the rule of January 26th to him, and he is not now allowed to practise in that court. Whether Mr. Bradley proposes to submit to this order and terminate this unpleasant affair here, we are not advised. To him personally we presume an exclusion from that court would not be of much consequence; but considering the *ex post facto* nature of the order as applied to him, and the evasive compliance with the letter of the mandate from the Supreme Court of the United States, we think it unlikely that he will rest under an apparent defeat. We hope that for the prevention of further scandal and discredit to the legal profession, both at bar and on the bench, the court will reconsider its present untenable position, and restore Mr. Bradley to his professional rights, and that this may be the last occurrence of the kind we may have to chronicle or allude to.

J. T. M.

## ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF GEORGIA.<sup>1</sup>COURT OF APPEALS OF MARYLAND.<sup>2</sup>SUPREME COURT OF NEW YORK.<sup>3</sup>SUPREME COURT OF PENNSYLVANIA.<sup>4</sup>

## AGREEMENT.

*What will excuse Performance.*—In an action to recover damages for the breach of a contract by which the defendant, in December 1864, agreed to tow with his steamboat, the plaintiff's sloop and her cargo from one place on the Hudson river to another, the judge instructed the jury, in substance, that although navigation was prevented by the act of God, yet the defendant was liable if, at the time he contracted, he had reason to apprehend that navigation would be thus prevented before the contract was to be performed; as he should have provided for such a contingency in the agreement. *Held*, that if the freezing of the river excused the failure of the defendant to perform his contract, the charge was erroneous: *Worth v. Edmonds*, 52 Barb.

*Held*, also, that it was unnecessary for the defendant in the agreement to provide against such a contingency, as the law did it for him. And that if the evidence in regard to the condition of the river satisfied the jury that there was a sufficient cause, in such condition, to excuse the defendant from performance, he was entitled to a verdict: *Id.*

The freezing of a river is such an act of God as excuses performance of a contract to tow a vessel thereon; it being an act to which human agency does not contribute, and which it cannot control, and therefore for the consequences of which a party is not responsible: *Id.*

## ATTACHMENT.

*Abandonment by prior Attaching Creditor.*—Both plaintiff and defendant in error had issued attachment against Joseph A. Crew, and each had served I. S. & Sons with summons of garnishment. The garnishment in favor of B. & Co. was just served. B. & Co., after Murphy had obtained judgment on his attachment, dismissed their attachment in vacation. At the next term of the court, they were permitted with the consent of the defendant in attachment to reinstate their case. *Held*, that they lost their priority over Murphy by dismissing the attachment, and that they could not regain it by reinstating their case: *Murphy v. Bruce & Co.*, 38 Georgia.

<sup>1</sup> Prepared by J. H. Thomas, Esq., from advance sheets of 38 Ga. Reports.

<sup>2</sup> From J. S. Stockett, Esq., Reporter; to appear in 28 Md. Reports.

<sup>3</sup> From Hon. O. L. Barbour; to appear in vol. 52 of his Reports.

<sup>4</sup> From P. F. Smith, Esq., Reporter; to appear in 57 Penna. State Rep.

## BAILMENT.

*Pledge by Agent to secure his own Debt.*—An agent for the sale of goods cannot, as against the owner, pledge or mortgage them to a third party to secure an advance on his own account: *First National Bank of Macon v. Nelson & Co.*, 38 Georgia.

To constitute a pledge or pawn, under the Code, there must be a deposit of the thing pawned, and this cannot be dispensed with by a written agreement, that the party making the pledge will be the bailee of the pawnee: *Id.*

## BANKS.

*Assignment by.*—Where a bank made an assignment of its assets for the benefit of its creditors, and a large portion of the assets was in money at a market value, and a creditor nearly twelve months after the assignment, filed a creditor's bill, charging that six months after the assignment, and again shortly before the filing of the bill, he had demanded his share of the cash assets from the assignees, and they had refused to pay him unless he would release the bank from the whole of his claim, and the bill prayed an account. *Held*, that the bill was not demurrable. If there was complication or cause for further delay, it ought to be set up by way of defence, it cannot be assumed: *Dobbins v. Porter*, 38 Georgia.

## COMMON CARRIERS.

Where one transportation company receives from another freight, to be carried from one place to another, under a contract between the latter and the owner, it is entitled to the benefit of all stipulations in such contract affecting its liability: *Manhattan Oil Company v. The Camden and Amboy Railroad, &c., Company*, 52 Barb.

Thus, where freight was delivered to a company, at Cincinnati, under a contract between the latter company and the owner, to receive the same and carry it to New York, which contract contained a provision that the company receiving such freight should not be liable for damage or loss by fire, or other casualty, while the property was in *depots or places of transshipment*; and the property, after being carried by said company to Philadelphia, was delivered to the defendant, to be carried by it to New York, and there delivered; and the same having been carried by the defendant to New York and stored in its freight-house there, was destroyed by fire without any negligence, and before any notice of its arrival had been given to the owner: *Held*, that, as the company receiving the property at Cincinnati would not, under these circumstances, be liable for the value of such property, neither was the defendant liable: *Id.*

CONFEDERATE NOTES. See *Trustee*.

*As Consideration for Contract.*—Where a contract was made between two citizens of the late Confederate States during the war, on the 12th July 1862, payable three years after date, the consideration of which was Confederate treasury notes, the only circulating currency at that time, and which was recognised as *lawful* by the assumed authority which had the actual possession and control over the territory and people at the time the contract was made, *Held*, that although the issuing of such notes by the assumed Confederate authority, for the purpose of

carrying on a war against the government of the United States, may have been illegal, as against that government and the citizens thereof who, during the war, were under the *actual* protection of that government, outside of the lines of the assumed Confederate authority; yet such a contract made between citizens residing *within* the lines of the assumed Confederate authority, in their ordinary business transactions between themselves, and having *no connection with the prosecution of the war against the United States*, is not an illegal consideration, as *between the contracting parties themselves*, they having made the contract under the assumed authority which was then over them, and the assumed authority (whether rightfully or wrongfully is not now the question) *recognised the currency as legal and valid at the time the contract was made*; therefore *as between the contracting parties themselves*, the plaintiff below is entitled to recover: *Miller v. Gould*, 38 Georgia.

#### CONVEYANCER.

*Liability of.*—The rule of liability of conveyancers for errors of judgment is the same as lawyers and physicians: *Watson v. Muirhead*, 57 Penna.

A conveyancer employed (before the decision in *Sellers v. Burk*, 11 Wright 344) in the purchase of a ground-rent, relying on the opinion of legal counsel, that it was clear of encumbrances, so represented it to his principal, there being at the time a judgment by default against the vendor, the damages on which had not been liquidated, and under which it was afterwards sold by the sheriff. *Held*, that the conveyancer was not liable to the purchaser for negligence: *Id.*

To pass the title at that time with such an encumbrance, was not evidence of want of ordinary knowledge and skill and due caution, even if the conveyancer had passed it on his own judgment: *Id.*

#### CORPORATION.

*Action for Dividends, Evidence.*—In an action by a stockholder against a corporation, to recover a dividend declared by resolution of the directors in general terms, of so much money per share, evidence that the earnings of the corporation were received in property other than money, is incompetent, as it alters the legal effect of the resolution; which is no more admissible than it would be to alter its terms: *Scott v. The Central Railroad and Banking Company of Georgia*, 52 Barb.

Where a corporation makes dividends, payable in dollars, without any limitation, and without directing the payment to be made in any currency whatever, the case of *Ehle v. The Chittanooga Bank*, 24 N. Y. 548, prevents an inquiry into the means out of which it determined to make the dividends. The corporation is concluded by the resolutions directing the dividends. Per INGRAHAM, J.: *Id.*

#### CRIMINAL LAW.

*Motion in Arrest of Judgment.*—The bill of indictment contained but one count, which was for murder. The jury returned a verdict of guilty of "involuntary manslaughter," which was received by the court and the jury discharged. A motion was made in arrest of judgment on the ground that there are two grades of involuntary manslaughter—one

punished as a felony, the other by lesser punishment. *Held*, that the motion should have been sustained by the court: *Thomas v. The State*, 38 Georgia.

*Burglary*.—Where upon the trial of the defendant charged with the offence of burglary it was proved that the parties in possession of the warehouse alleged to have been broken and entered by the defendant, were in possession of the same under a written contract for rent, or lease, for a definite period of time: *Held*, that this parol proof of the possession of the warehouse under written contract for lease or rent at the time the alleged burglary was committed as charged in the indictment, was sufficient to sustain that allegation without the production of the written lease: *Houston v. The State*, 38 Georgia.

*Plea of Autrefois Acquit*.—Where five defendants were indicted for the offence of an assault, with intent to murder, and after being arrested, demanded their trial under the provisions of the 4554th section of the Code, and the state not being ready, were discharged and acquitted by the judgment of the court, and were afterwards indicted for the same act of shooting, under the charge and accusation of an "aggravated nature," and to the second indictment the defendants, on being arraigned, filed the plea of *autrefois acquit*, to which plea the counsel for the state demurred, and the court below sustained the demurrer, and decided that the defendant's plea was not a good bar: *Held*, that the court erred in sustaining the demurrer to the defendant's plea: *Holt v. The State*, 38 Georgia.

#### DEBTOR AND CREDITOR.

*Right of Subsequent Creditors to impeach a Conveyance*.—If, at the time a conveyance is made, there is no person competent to question its validity, the title will vest in the grantee absolutely, as against all the world. Subsequent creditors of the grantor cannot reach it in such a case, as the foundation upon which their rights are held to attach to property once owned by their debtor does not exist. It is only when a conveyance is void, or voidable, as to creditors, when made, that subsequent creditors of the grantor can attach it on that ground alone. It is not, in such a case, a *bonâ fide* conveyance to the grantee, either as to prior or subsequent creditors: *Baker v. Gilman*, 52 Barb.

*Who is a Subsequent Creditor*.—The defendant being sued in actions for slander, retained the plaintiff, an attorney, to defend those actions. Three days afterwards, the defendant conveyed his property to a third person, for the purpose of defeating the claims of the plaintiffs in the slander suits, should any be established. Soon afterwards the plaintiff was informed of such conveyance by the grantor, and of its object. Only a small portion of the plaintiff's demand had then been earned. He went on defending the actions without objection for more than a year, when they were determined in the defendant's favor. *Held*, that the credit was not given by the plaintiff upon the faith of the defendant's ownership of the property conveyed, and that his demand being embraced in a judgment recovered nearly two years after the conveyance, he was clearly a subsequent creditor of the defendant: *Id*.

*Who may impeach*.—A creditor who has trusted his debtor after being fully informed by the latter that he has put his property out of



his hands, by a conveyance valid as between him and his grantee, though voidable as to existing creditors, should not be allowed to come into court and claim that such conveyance was fraudulent and void as to him, on account of such indebtedness: *Id.*

As to such creditor, a conveyance of that kind would not be fraudulent in any sense, and cannot be avoided on that ground: *Id.*

#### EXECUTION. See *Partnership*—*Sheriff*.

*Fraud—Payment in Confederate Money.*—Plaintiff in the court below sold to defendants four bales of cotton while Confederate money was the currency and had a market value, and was to receive that currency in payment. Defendants delayed payment until the Confederate armies had surrendered, when one of them, with knowledge of the surrender, visited the plaintiff at his residence in the country, and paid the debt in Confederate currency, at a time when plaintiff swears he had no knowledge of the surrender. *Held*, in such case, that it is a question proper for the jury to determine whether defendant practised a fraud upon plaintiff by taking advantage of his ignorance, and misleading him to receive the notes in payment when defendants knew they were in fact of no value by reason of the failure of the Confederacy: *Blalock et al. v. Phillips*, 38 Georgia.

#### HIGHWAY. See *Municipal Corporation*.

#### HUSBAND AND WIFE.

*Wife's Separate Estate—Bill of Sale void as to Creditors.*—The receipt and appropriation by a husband of money, constituting the separate estate of his wife, with her knowledge and acquiescence, does not establish the relation of debtor and creditor between them, and entitle the wife to compensation out of the husband's assets, unless at the time of such receipt he expressly agreed to repay the money so received and appropriated: *Kuhn v. Stansfield*, 28 Md.

A husband voluntarily executed a bill of sale, to secure to his wife a sum of money, constituting her separate estate, which he had received with her knowledge and acquiescence, and invested in his business, but which, at the time of such receipt, he did not agree to repay. *Held*: That such conveyance was void as to prior creditors, it not appearing that the debtor had other property sufficient to satisfy them: *Id.*

#### INSURANCE.

*Factory—Mill—What are meant by.*—A policy of insurance on a building had this condition: "The following risks being considered more hazardous than others, *buildings* intended to be occupied by persons carrying on any of the undermentioned trades or business, or in which any large quantities of the undermentioned goods are deposited, will be subjected to an extra premium on that account. No policy, therefore, will be construed to extend to such a risk, unless liberty be given for the purpose, and expressed thereon." One of the specifications of such risks was, "mills and manufactories of any kind." With the consent of the company the tenant kept hay, straw, produce, &c.; this he gave up and kept broom-corn and made brooms by hand. *Held*,

this did not come within the prohibition of "mills and manufactories:" *Franklin Ins. Co. v. Brock*, 57 Penna.

A mill within the meaning of the prohibition is not merely a place where something might be ground, nor a manufactory merely where something may be made by hand or machinery, but what common usage recognises as a mill or manufactory respectively: *Id.*

Two adjoining houses of the same owner were insured by one company at the same time, but in two distinct policies. *Held*, that the policies were distinct contracts, and that the assured could recover for damage by fire to one building, although the other building may have been used in a manner prohibited by the policy and the fire originated in it: *Id.*

A premium for insurance above the usual rate, is evidence indicating though not proving that a more than usual risk was assumed; but a jury should not infer that a concealed or misrepresented fact was to be at the risk of the insurers: *Id.*

Describing a building insured as a "storehouse," is descriptive only, and not a warranty or representation that nothing should be done in it but keeping a store or a storehouse: *Id.*

A *storehouse* was insured, and keeping broom-corn was not specified as a hazardous risk; the assured had a right to keep broom-corn there. Keeping it did not prevent his recovery for damage to the building by fire, because the danger was greater by keeping it, or because the fire originated in it: *Id.*

A policy enumerating certain risks as hazardous, does not cover any of them unless liberty be given to keep the articles, &c., mentioned as hazardous: *Id.*

If words in a policy are of doubtful signification, the meaning most favorable to the assured is to be adopted: *Id.*

#### JURISDICTION.

*Appeal—Limited Jurisdiction.*—The right of appeal from the decisions of the Commissioners for Opening Streets, being given to the Criminal Court of Baltimore, it is the exclusive province of that court to determine whether such an appeal has been regularly and properly taken, and its judgment thereon is final and conclusive, no right of appeal therefrom having been given by statute: *Rundle v. Baltimore*, 28 Md.

If no appellate power had been conferred on the Criminal Court of Baltimore in such cases, its judgments unwarrantably pronounced in assertion of jurisdiction over the subject, might by appeal be reviewed and reversed in this court: *Id.*

The Criminal Court of Baltimore, in reference to proceedings had therein, on appeal from the decision of the Commissioners for Opening Streets, is clothed only with a special and limited jurisdiction, to be exercised in a particular manner, and not according to the course of the common law; and from a judgment rendered in the exercise of such special jurisdiction, in the absence of express right given by statute, no appeal will lie to this court, whether the judgment be pronounced in the exercise of original jurisdiction, or on appeal from some inferior authority: *Id.*

#### LAND.

*Right to Bore for Oil—Corporeal Interest.*—An agreement to lease

land for a term of years, with the exclusive right to bore for and collect oil, giving one-fourth to the lessor: *Held*, to pass a corporeal interest: *The Chicago, &c., Oil Co. v. U. S. Petroleum Co.*, 57 Penna.

The taking by the lessee of his share of the oil found is not waste, but a rightful act, unless the lease be forfeited by its own terms: *Id.*

Where a party has title and possession under a lease in writing, enjoying rights apparently legal, a receiver will not be appointed unless under urgent and peculiar circumstances. The plaintiff must show a clear right or a *prima facie* right, with such circumstances of danger or probable loss as will move the conscience of a chancellor to interfere: *Id.*

LICENSE. See *Land*.

#### LIS PENDENS.

*Pendency of a Suit in a Court of another State.*—While it is settled, that for all national purposes embraced by the Federal Constitution, the states and the citizens thereof constitute one government, united under the same sovereign authority, and governed by the same laws, yet in all other respects and for all other purposes, the several states retain their individual sovereignties, and with respect to their municipal regulations, are to each other foreign: *Seevers v. Clement*, 28 Md.

In legal contemplation the jurisdiction of the courts of Pennsylvania is foreign to the jurisdiction of those of Maryland: *Id.*

At the common law the rule is well established, that the pendency of a prior suit *in personam* in a foreign court, between the same parties, for the same cause of action is no sufficient cause for stay or bar of a suit instituted in one of our own courts. It is only the definitive judgment on the merits that will be considered conclusive: *Id.*

This rule has been frequently and upon good and sufficient reasons declared to obtain in all its force, both by Federal and state courts, in regard to actions pending in another state of the Union: *Id.*

#### MORTGAGES.

*Delivery—Date.*—The date of a mortgage is the day of its delivery, and that day may be shown by parol notwithstanding a different date be on the face of the deed: *Russell v. Carr*, 38 Georgia.

Two mortgages executed in the same day are of equal date, and, if both are recorded in time, are entitled to share *pro rata* in a fund not sufficient to satisfy them both: *Id.*

The law will not note fractions of a day except to prevent injustice, and in cases specially provided by law: *Id.*

#### MUNICIPAL CORPORATION.

*Negligence—Highway.*—A municipal corporation, the owner of a market, the stalls of which it rents, is bound to keep the pavements in front of the stalls in a safe condition, and if a citizen of the corporation is injured through a neglect of this duty by the officers of the corporation, the corporation is liable to the extent of the injury received: *The City of Savannah v. Cullens and Wife*, 38 Georgia.

NEGLIGENCE. See *Municipal Corporation*.

*Injury to Dam by Matter thrown in the Stream.*—A dam was filled

by deposits of coal-dirt from different mines on the stream above the dam, some worked by defendants and their tenants and others by persons entirely unconnected with the defendants. The court charged in substance that if at the time the defendants were throwing coal-dirt into the river, the same thing was being done at other collieries and they knew of it, they were liable for the combined results of all the deposits. *Held*, to be erroneous: *Little Schuylkill Nav. Co. v. Richards*, 57 Penna.

The ground of the action is not the deposit of the dirt in the dam by the stream, but the negligent act above: *Id.*

Throwing the dirt into the stream is the tort, the deposit is only the consequence: *Id.*

The liability of the defendants began with their act on their own land, and was wholly separate and independent of concert with others. Their tort was several when committed, and did not become joint because its consequences united with other consequences: *Id.*

The defendants are not liable for acts of their tenants, not done by their authority or command: *Id.*

*Infant—Duty of Parent.*—Though an infant of tender years may recover for an injury, partly caused by his own imprudent act, the father cannot: *Glassey v. Hestonville R. Co.*, 57 Penna.

It makes no difference whether the injury was to the father's absolute or relative rights: *Id.*

Protection being a paternal duty, entire failure to extend it is negligence: *Id.*

If a father permits a child of tender years to run at large, without a protector, in a city traversed constantly by cars and other vehicles, he fails in the performance of his duty and is guilty of negligence: *Id.*

The fact that a young child having parents, is found alone and unprotected in the street, is presumptive evidence that he was so exposed voluntarily or negligently by his protectors: *Id.*

It is the duty of the parent at all times to shield his child from danger, and this duty is the greater when the risk is imminent; the degree of protection is in proportion to the helplessness and indiscretion of the child: *Id.*

*Infant.*—To a child of tender years no contributory negligence can be imputed: *N. P. R. Co. v. Mahoney*, 57 Penna.

A person not in charge of a child of tender years, took it into her arms with intention to protect it, fell with it on a railroad track and the child was injured by the engine. An action would lie against such person at the suit of the child, but the negligence of such person was not contributory negligence on the part of the child so as to discharge the railroad company, their servants having also been negligent: *Id.*

#### NUISANCE.

*Indictment for.*—A person who shall erect or continue (after notice to abate) any nuisance which tends to annoy the community, or injure the health of the citizens in general, or to corrupt the public morals, is liable to indictment under the penal code of this state. This legal offence of continuing a nuisance is not complete before notice to abate. And until the notice is given and the legal offence is complete, the city

authorities have power, as a police regulation, to punish for the continuance of such nuisance, as would subject the offender to indictment after notice to abate. But where the offence is complete they have only the power to bind over the offender to the proper court to answer for the offence: *Vason v. The City of Augusta*, 38 Georgia.

A landlord who has leased premises to a tenant is not liable for a nuisance maintained upon the premises by a tenant during the lease. If the nuisance existed on the premises when the lease was made, the landlord is liable. But if the tenant continues the nuisance after he obtains exclusive possession and control, he alone is liable for its continuance. As the landlord, under our statute, is liable for necessary repairs on the premises, if the nuisance grows out of his neglect to make the repairs, the tenant may make them, and set off the reasonable value against the rent due the landlord: *Id.*

#### PARTNERSHIP.

*Lien of Creditors on separate and joint Property.*—Cake took a mortgage on Snyder's interest in land, appearing by the record to be held in common with Bergstresser, without notice that it was partnership property. He afterwards took another mortgage on the land from Snyder and Bergstresser, for a partnership debt; and at the same time Snyder confessed to Cake a judgment on his individual property, as collateral security for the latter mortgage. The land was sold under both mortgages, but did not pay the debts. *Held*, that the collateral judgment was not extinguished by the sale: *Vandike's Appeal*, 57 Penna.

The personal property of the partnership was sold on an execution on the judgment against Snyder and on executions against Bergstresser. *Held*, that the proceeds should be divided between the executions against Snyder and those against Bergstresser: *Id.*

When partnership property is sold under separate executions against the partners individually, the proceeds represent the several interests of the partners and not that of the partnership: *Id.*

RECEIVER. See *Land*.

#### SEDUCTION.

*Pleading and Evidence in Action for.*—In an action on the case by a father for the seduction of his daughter, under twenty-one years of age, *per quod servitium amisit*, the relation of master and servant, at the time of the seduction, must be averred in pleading, and established by proof: *Greenwood v. Greenwood*, 28 Md.

A farther may maintain an action for debauching his daughter, under age, *per quod servitium amisit*, although she was not living with him at the time the offence was committed, unless by some act of his own, he has destroyed the relation of master and servant, which the law implies from the legal control he has over her services: *Id.*

#### SHERIFF.

*Right to return "Nulla Bona" where Title is doubtful—False Return.*—In an action for a false return of "*nulla bona*," unless it appear that the property pointed out belonged to the defendant in the execu-

tion, an offer to indemnify the sheriff will not make him liable: *Commonwealth ex rel. Hood v. Vandyke*, 57 Penna.

The Interpleader Act of April 10th 1848 is not imperative on the sheriff; but it affords him a means of relieving himself from responsibility. He may take the risk of returning "*nulla bona*" or levying and selling: *Id.*

When there is a claim of property adverse to the defendants which would raise a reasonable doubt as to title, or create a pause in the mind of a constant man, the sheriff has a right to call on the plaintiff for indemnity, and if refused, may ask the court to enlarge the time for his return till indemnity be given: *Id.*

Whether the insufficiency of the indemnity, although it may justify no return, is a defence to an action for false return. *Dubitatur*, per SHARSWOOD, J.: *Id.*

A sheriff has a right to require that the sureties in a bond of indemnity to him should reside in his county: *Id.*

Whether the indemnity is reasonable ought not to be too broadly submitted to the jury without instructions, but is within the province of the court, leaving the facts, if disputed, to the jury: *Id.*

#### STAMP.

*Letters—When to be Stamped.*—A debtor placed a note due him in the hands of a creditor to receive the amount, and afterwards wrote to another creditor that he should receive his debt from the proceeds of the note after the first creditor should be paid; the second creditor, by direction of the debtor, showed the letter to the first, who promised to pay the money when received. *Held*, that the letter was not an instrument requiring a revenue stamp: *Boyd v. Hood*, 57 Penna.

A tax law cannot be extended by construction to things not described as the subject of taxation: *Id.*

A letter in the character of a substantial instrument cannot be used to evade taxation: *Id.*

*Accidental Omission to Stamp at the Proper Time.*—A note having been executed at a time when the parties did not know it was necessary to place a revenue stamp upon it, and on the fact being ascertained, the maker having voluntarily placed the necessary stamp on the note, and again delivered it to the payee, whereby the government received the revenue to which it was entitled, the maker will not now be allowed to controvert the fact that the note was legally stamped: *Green v. Lowry*, 38 Georgia.

#### SURETY.

*Discharge of.*—As Congress has the power, under the Constitution, to establish uniform laws on the subject of bankruptcies throughout the United States, and as the Act of Congress forbids the prosecution of an action against a person adjudged a bankrupt, until the question of his discharge has been determined, and relieves him, when discharged, from all debts, liabilities, &c., which might have been proved against his estate; a surety on an appeal bond in this state is no longer liable, when the principal is discharged in bankruptcy, which discharge of the principal terminates the case pending in the state courts against him, and

prevents any judgment. The surety on the appeal does not contract to pay the debt, but the judgment that may be entered in the suit then pending: *Odell v. Wooten*, 88 Georgia.

#### TRUSTEES.

*Ordinary Care by.*—A trustee in possession of the trust property, is only bound to ordinary diligence in its preservation and protection: *Campbell v. Miller*, 38 Georgia.

If the trust property consists of promissory notes the trustee may receive payment of the notes when due, in such currency as a prudent man would receive for debts due him under similar circumstances: *Id.*

If the trustee changes the investment with the consent of the *cestui que trust* who is of legal age, he is not liable for any loss growing out of any such new investment: *Id.*

#### VENDOR AND PURCHASER.

*Constructive Delivery—Symbolical Delivery—Vendor's Lien—Stoppage in Transitu as between Vendor and Vendee.*—A quantity of pig iron lying in piles at a furnace and on the road was sold, and the parcels constituting the whole were pointed out and shown by the agent of the vendor to the agent of the vendees, and the whole was charged in the books of the vendor to the vendees by their agent, under the direction of the vendor. *Held*: That these acts being done with the intent and for the purpose of making delivery, constituted such a constructive delivery as would pass the title to the vendees: *Thompson v. B. & O. R. R. Co.*, 28 Md.

Where ponderous articles incapable in the ordinary course of business of actual manual delivery, are the subject of sale, symbolical or constructive delivery is sufficient, and such constructive delivery may be implied from the acts of the parties: *Id.*

There is a marked distinction between those acts, which as between vendor and vendor, upon a contract of sale, go to make a constructive delivery and to vest the property in the vendee, and that actual delivery by the vendor to the vendee, which puts an end to the right of the vendor to hold the goods as security for the price; and the law in holding that a vendor who has given credit for goods, waives his lien for the price, does so on one implied condition, which is, that the vendee shall keep his credit good. If, therefore, before payment, the vendee become bankrupt or insolvent, and the vendor still retains the custody of the goods, or any part of them; or if the goods are in the hands of a carrier, or middleman, on their way to the vendee, and have not yet got into his actual possession, and the vendor, before they do so, can regain his actual possession, by a stoppage *in transitu*, then his lien is restored, and he may hold the goods as security for the price: *Id.*

The lien of the vendor always exists until he voluntarily and utterly resigns the possession of the goods sold, and all right to detain them. So long as the vendor does not surrender actual possession, his lien remains, although he may have performed acts which amount to a conclusive delivery, so as to pass the title or avoid the statute: *Id.*

In all cases of symbolical delivery, which is the only species of constructive delivery sufficient to give a final possession to the vendee, it

is only because of the manifest intention of the vendor utterly to abandon all claim and right of possession, taken in connection with the difficulty or impossibility of making an actual and manual transfer, that such a delivery is considered as sufficient to annul the lien of the vendor: *Id.*

*When Title does not pass.*—The title to property sold does not pass to the vendee, where anything remains to be done in order to ascertain the precise property sold or the price to be paid: *Camp v. Norton et al.*, 52 Barb.

But whether the kind, or the quantity of property has been ascertained, so as to pass the title, are facts to be proved in each case, and cannot, ordinarily, arise upon a complaint properly drawn: *Id.*

*Complaint in Action for Refusal to Deliver.*—In an action by a vendee against the vendor to recover damages for not delivering the property sold, it is only necessary for him to aver, in his complaint, the making of the contract, performance or readiness to perform, on his part, and neglect or refusal to deliver on the part of the vendor after demand, when demand is required by the contract: *Id.*

*Separating, Weighing or Measuring of Property.*—There is no presumption of law that property sold has not been separated, weighed or measured, so as to pass the title. If these acts are not done, it devolves on the party insisting on these omissions to show them, and thus discharge himself from a liability which would otherwise devolve upon him: *Id.*

#### WASTE.

*Opinion of Witness—Cutting of Timber.*—In an action for waste, a witness must state *facts*, and while he may give his *opinion* accompanied by the facts upon which it is predicated, as to the number of acres from which the timber has been cut, the value of the land before and after it was cut, the whole number of acres in the tract, the proportion of the timbered land, and the like; it is error in the court to permit him to give in evidence his *opinion* that the estate of the remainderman has been damaged a certain amount by the acts of the defendant. It is the province of the jury to draw from the facts stated, their own conclusion as to the amount of damage, if any, sustained by the plaintiff: *Woodward v. Gates et al.*, 38 Georgia.

The stringent rules of the English laws relative to waste were not applicable to our condition, and were not embraced in our adopting statute. It is not always waste for a tenant for life to cut growing timber or clear land. Regard must be had to the condition of the premises; and the proper question for the jury to decide under the instructions of the court will be, did good husbandry require the felling of the trees, and were the acts such as a judicious, prudent owner of the inheritance would have committed: *Id.*

#### WITNESS.

*Mileage.*—A witness for the state in a criminal case, who, in obedience to a subpoena served upon him while temporarily in this state, actually comes from his home in a distant state, where he resided when the subpoena was served upon him, and testifies in the case, is entitled



to mileage from the county treasury for the whole distance travelled in coming from and returning to his home: *Ducher v. Justices of Inferior Court*, 38 Georgia.

## NEW LAW BOOKS.

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OUR PATENT SYSTEM.

A WRITER in the August number of the *Atlantic Monthly*, upon "Ideal Property," seriously recommends that the United States shall drop its present system of examining applications for patents on inventions, to see that they contain novelty; and shall make the Patent Office, as the District Courts are now in reference to copyrights, a mere register, where any one may deposit his specification of what he alleges to be his invention, and then trust to the absolute novelty of the device, as it may be possible to establish it before the courts, for protection against pirates and infringers.

Hon. Elisha Foote, the Commissioner of Patents, has lately made the regular annual report of the Office to Congress; and he recommends therein the present system, only he would have the examinations made more strict and thorough. Commenting upon this report, the *Scientific American*, the paper best known to inventors and mechanists in this country, favors the total abolition of examinations, from which editorial opinion a contributor to the same periodical has expressed his dissent. Taking these articles all together, it is clear that the question of changing our present law is undergoing considerable discussion; and with reference to this question it is proposed to say a few words.

First, with reference to the nature of property in inventions. The text-writers upon this subject seem to have had some difficulty

in making it plain that it is right to make patent laws at all. It cannot be doubted that when a man has made an invention, literary, chemical, or mechanical, it is exclusively his own so long as he chooses to keep it a secret to himself; no one else can possibly make use of it till the inventor chooses to make it known, and there is no possible way of extracting it from him, or even of knowing that he has made an invention, except by his own free will.

So that it is but a matter of policy on the part of the state, a contract which selfishness, pure and unmixed, might induce the state to make, to offer to the inventor a monopoly of his invention for a limited time, if he will but make his device so public that all citizens may make and use it at the expiration of the time limited. The state drives an excellent bargain with the inventor when it does this; and most people will admit that a law knows no better reason for its creation than this.

Since this is so, it is for the interest of both parties to the contract—the state and the inventor—that the law shall be so framed as to best protect and reward the inventor during the existence of the monopoly, so that as many persons may be induced to become inventors as possible; and how best to attain this end is really the question, or problem, under discussion. Will the inventor be better protected by a system that has no examination for novelty than now?

The United States contain thirty millions of inhabitants, a very small fraction of the civilized world, or of that part of the world which has patent laws; for instance, Russia has one hundred millions of inhabitants, and patent laws; and yet we produce every year more inventions and patents than all the world beside. It is plain to all the world that this country is, *par excellence*, the home of inventive genius; and in the very tales and romances of other lands, the inevitable Yankee is made to whittle himself into a fortune. This is not altogether because of the “universal Yankee genius,” but is owing somewhat to the differences in the patent systems of this and other countries.

Most other nations have just such a patent system as the Atlantic writer and the Scientific American propose. The Atlantic article stated that *all* other countries have such systems, but, as the present writer believes, the statement is incorrect. In the Argentine Republic, The Grand Duchy of Baden, Bavaria, Ja-

maica, The Netherlands, Prussia, Russia, and Wurtemberg, examinations are required by law; but it is generally understood that the examinations are not nearly so well made there as here: probably the happy medium of statement in the matter is that nowhere else are regular and searching examinations made as with us.

The fostering influence of our law has had much to do with producing our first-class inventors: our present law holds out such substantial rewards, that men are induced to devote themselves exclusively to invention, with a reasonable hope of support and success. The Atlantic writer says: "All great inventors, and most of the lesser, are specialists, and in their own lines consider rightly that they know more than the Patent Office;" that the present system "helps the charlatan and hinders the *savant*;" that "it is a cheap repute and brass-farthing celebrity that the United States boasts of when it plumes itself on the progress of invention shown by the number of patents issued."

The gist of his reasoning, and that of all who oppose our present system, is that the examinations are often imperfectly made, and patents granted when they ought not to be. The present writer ventures to presume that if these examinations are properly made all will concede that our system is the best in the world, and that it is only because of failure in this respect that the whole law is objected to,—that is, the objectors would change the law because its provisions are not perfectly carried out.

Let us see how this reasoning would work with another law. Because we do not always succeed in convicting thieves and forgers, is it best to abolish the law which decrees their punishment? Because examinations are not thoroughly made, shall we therefore abolish the examinations? To most minds the answer is plain,—assuredly not. The Atlantic writer further says: "Were it possible to obtain a complete knowledge of the work, published and unpublished, before the world and in the closet, of all students, a preliminary examination might insure novelty. It cannot do this; and, of course, without experiment or a perfect knowledge of principles and a perfect reasoning faculty, utility cannot be insured." This must be regarded as mere statement; until it is shown *why* it is not possible to make a good examination in the large majority of cases, there is, probably, not much chance for argument. This has not been done so far, and, probably, will not be. Because these examinations are not now well made, is no reason that they

cannot be: many things are not done at Washington that ought to be, and this is one. The writer believes that most persons will agree with him, that by a better and more divided system of examinations, coupled with the employment of examiners whose services can only be had by the payment of higher salaries, this work might be done nearly to perfection.

It certainly could be done much better than it is at present. Suppose that it is only so well done that nothing described in a home or foreign publication, or known to the present generation at home, shall obtain the seal of the Patent Office, and the work is done well enough.

If a device, old but useful, has passed out of the memory of the present generation and is again invented, the inventor does as much good as though he had discovered something entirely new. The law might be somewhat modified to meet this view of the case, but such a modification would be no radical change in our present system.

The remedy proposed by the writers referred to, is of the kind indigenous to the American mind; it springs from the purely American idea that everything can be done by legislation, and that all that is needed when one law is badly executed, is to pass another of an opposite nature. Does gold go up, or the balance of exchange stand against us; do men get drunk, or married people get divorced; do the heavens threaten to fall, or the waters to rise—straightway we proceed to cure the trouble with a new law, when the appropriate and proper thing, under the circumstances, is to see that the present one is well executed.

The largest patent-soliciting house in London has gratuitously said, in a recent circular, that "the American origin of an invention is a recommendation in England." What could have made John Bull look so favorably upon us in this respect, when we well know that he will never acknowledge us to be his superiors in invention? It is because he knows that when a patent, which is really useful, passes the ordeal of our Patent Office, it is, probably, *new*. They have no examinations in England; and parties, manufacturing under good and valid patents, are harassed greatly by interfering, subsequent patents procured for the sole purpose of blackmailing; and which, as a general rule, the manufacturers find it cheaper to buy up than to litigate.

The Atlantic writer says that our present law "helps the charla-

tan and hinders the *savant*." *How* "helps the charlatan?" Would not the charlatan be pleased if he could, at will, patent anything under the sun, and then hawk it about the country with its truly "pinchbeck endorsement?" *How* "hinders the *savant*?" Is not the *savant's* real invention perfectly protected by our present law? It can be no better protected by any law; and, at present, there is a preliminary barrier for the charlatan who would vex him with a patent copied from his own to surmount, which barrier would not exist if the examinations were abolished.

Abolish all preliminary examinations for novelty, and one of two things happens; either patents will become, for the most part, valueless; or the country will be overrun with charlatan inventors. Such abolition would surely tend to crush poor inventors and help rich ones. In all probability, no patent could be sold for a dollar that had not appended to it a full and accurate history of all similar inventions, showing that no one had ever preceded the present patentee, which history would have to be certified to, by some specialist or expert, whose name and reputation would be a guaranty that the history was correct; all this at a cost that not one inventor in a hundred could afford; and it is a reasonable prophecy, that not one-tenth of the number of patents granted now, would be granted after such a change as proposed. This must happen sooner or later, for if, at first, the other extreme is reached, and the country is flooded with patents on old devices, the very word, "patent," would soon become a synonym for worthlessness, and a severe reaction would take place.

It is to be feared that we should learn from sad experience how much our national progress and prosperity are based upon the inventive genius of our country. Granted that a majority of our patents are worthless, who can estimate the incalculable harm that would result from retarding and repressing the inventive genius of our countrymen, by withholding the reasonable rewards we now hold out? Granted that the majority of our patents are worthless, they do no harm; and while there would not, probably, be one-tenth of the present number of patents granted under a system changed as proposed, there is no good reason for supposing that any larger percentage of the patents then granted would be useful than of those granted now. Indeed, it is quite reasonable to suppose that this percentage would be still smaller, for only the rich

inventors could then afford to put their patents into saleable shape, and wealth is not the soil in which true invention flourishes.

When we stop for a moment to reflect, we must be convinced that our magnificent material prosperity, as a nation, is owing very largely, more than to any other cause, to the prolific inventive genius of our people.

The best impression we could possibly put upon our national coat-of-arms would be a pencil, hammer, and drill; for mainly by the aid of these and their kin have we made our great nation what it is in material prosperity.

The true way to better ourselves in patent matters is not to radically change the law, but to make the examinations under it more strict, searching, and accurate.

There can be little doubt that it is possible to so perfect these examinations that ninety per cent. of all patents granted shall be novel; and when we reach this point, we shall be carrying out the law more perfectly than any other law was ever executed. We shall make patents still more valuable than they are, foster still more our native genius for invention, and our country will grow and prosper in proportion.

W. E. S.

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#### RECENT AMERICAN DECISIONS.

*Supreme Court of Vermont, January Term 1869.*

JAMES SHEEHY v. JOHN ADARENE.

Where a verbal contract is to be performed within a year by one party, but not by the other, the question whether the Statute of Frauds applies or not depends on whether the suit is brought against the party who was to perform his part within the year. If it is so brought, the statute would not apply, but if brought against the party whose agreement was not to be performed within the year, then the statute would be a bar.

On the 19th of March 1864 the parties made a verbal contract by which the defendant agreed to furnish the plaintiff, on the 1st day of April next following, or within a short time thereafter, a cow for the use of the plaintiff, or forty dollars in money with which to purchase a cow, and that the plaintiff was to have the use of said cow for the period of one year from said 1st day of

April, and that the plaintiff, at the end of the year, was to have the privilege of electing either to purchase the cow by paying forty dollars in money and one year's interest on that sum for her, or to pay a reasonable sum for her use for that year; the cow to be the property of the defendant until the end of that year. The plaintiff made proper and reasonable demand of the defendant to furnish the cow, but the defendant refused to do so.

This is *assumpsit* to recover damage for the breach of said contract. No question was made in the county court as to the sufficiency of the consideration for said contract. The only point made by the defendant was, that, as the contract was verbal, and executory on both sides, and the plaintiff's part not to be performed till after the lapse of more than a year, the action could not be maintained. Upon this point the court held that it could be maintained, and a verdict and judgment were rendered for plaintiff. To this ruling the defendant excepted.

*Ballard*, for defendant, cited Gen. St., cap. 66, § 1; *Squire v. Whipple*, 1 Vt. 69; *Hinkley v. Southgate*, 11 Id. 428; *Peirce v. Estate of Paine*, 28 Id. 34; *Boydell v. Drummond*, 11 East 159; *Foot et al. v. Emerson*, 10 Vt. 342; 20 Me. 122; *Peter v. Compton*, 1 Sm. Lead. Cas. 539-541; *Broadwell v. Gitman*, 2 Denio 87; *Cabot v. Haskins*, 3 Pick. 83; *Lockwood v. Barns*, 3 Hill 131; *Browne on Frauds*, § 286.

*Wilbur*, for plaintiff, cited 3 Vt. 290; 23 Id. 497; 28 Id. 358; *Browne on Frauds*, § 403-4, § 135; 6 Vt. 69; Id. 888; 14 Id. 446; 24 Id. 606; 29 Id. 510; 28 Id. 34; 20 Ind. 24; 33 N. H. 239; 6 Rich. 14; 10 Me. 31; 1 Kelly 340-8; 4 Md. 476-8; 3 B. & Ad. 899; 2 C. B. N. S. 66; 2 C. B. 808; 7 Ala. 161; 1 Root 142; Id. 479; Chit. on Cont. 68-9; 26 Penna. 327; 31 Id. 322; Id. 523; 83 Id. 169; 46 Id. 504; 35 Id. 308.

#### Opinion of the court by

BARRETT, J.—Our statute is that “no action shall be brought upon any agreement not to be performed within a year from the making thereof, unless,” &c. In this case, what the defendant undertook to do, was to be done entirely and completely within a month or so after the making of the contract. The things to be done by the plaintiff were not to be done till more than a year from the making of said contract. If the plaintiff had broken the



contract, the case of *Peirce v. Estate of Paine*, 28 Vt. 34, would seem to be direct that an action for such breach could not be maintained against him. Can this action be maintained against the defendant for the breach of the contract committed by him? It is to be premised, that, in this case, a fact is lacking that has existed and been named, and perhaps regarded as more or less important, in some of the reported cases, and in the discussions of authors and commentators upon the subject, viz.: performance by the plaintiff of the contract on his part, for in this case the plaintiff had nothing to do till the defendant had performed on his part by furnishing the cow or the money, and the plaintiff had kept the cow through the designated year. If, therefore, the defendant is to be held liable in this action, it must be by the vigor of the contract, and not by reason of benefit received and enjoyed by him resulting from performance of the contract on the part of the plaintiff.

The only point of exception is raised upon the fact that, by the terms of the contract, "the plaintiff was not to perform his part of it until after a period of more than a year had elapsed from the making of it." In the bill of exceptions it is also said that "no question was made as to the sufficiency of the consideration of the cow contract;" and, in this court, counsel have treated the defendant's agreement as valid in every respect, and enforceable, provided it does not fall within the operation of the statute above cited. We treat it in the same way, and also confine the decision to the ground and point of exception.

It is conclusively settled by the decided cases in this state that the *agreement* signified by the clause of the statutes above quoted must be capable of being completely performed within the prescribed year: *Squires v. Whipple*, 1 Vt. 69; *Hinkly v. Southgate*, 11 Id. 428; *Foot v. Stone v. Emerson*, 10 Id. 342. It is claimed by the defendant that "the term 'agreement,' as used in the statute, must be construed as meaning and including what is to be done by both parties." This claim presents the hinge-point of the case. In the famous case of *Wain v. Warlters*, 5 East 10, it was held that the word *agreement*, in its application to the clause of the Statute of Frauds as to the *special promise* to answer for the debt, default, or miscarriage of another, requires the consideration, as well as the promise of the party sought to be charged, to be in writing. After various expressions of surprise,

and voluminous criticisms by English judges and lawyers, and some almost contrary decisions, the Court of King's Bench, ABBOTT, C. J., BAYLEY, HOLROYD, and BEST, JJ., deliberately sanctioned, and directly applied, the doctrine of that case, in the year 1821, in *Saunders v. Wakefield*, 4 B. & Ald. 595. The varied fortunes of the law of that case, both in England and America, are shown with learned and painful elaboration by PARKER, C. J., and the decision disapproved in the same year, 1821, in the case of *Packard v. Richardson et al.*, 17 Mass. Rep. 122. In Day's Edition (1817) of East's Reports is also a very learned, acute, and exhaustive note furnished by Judge SWIFT, and enlarged by the editor, disapproving that decision. The subject is brought down to a very recent date in the last edition of Smith's Lead. Cas., and it appears that the doctrine of *Wain v. Warlters*, is now the established law of the point in Westminster Hall. Our own court has had occasion to administer a similar statute. At the time *Smith v. Ide*, 3 Vt. 290, arose and was decided, our Statute of Frauds was as follows: "Sec. 1. That no suit in law or equity shall be brought or maintained upon any contract or agreement hereafter to be made, whereby to charge any executor, &c., \* \* or whereby to charge the defendant upon any special promise to answer for the debt, or default, or miscarriage of another person; \* \* or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the contract or agreement upon which such action shall be brought," &c. This obviously contemplates an action upon a *contract* or *agreement* whereby to charge the defendant upon a special promise—that is, a suit brought upon the whole contract or agreement in which the defendant's special promise was embraced and was obligatory upon him. That mode of using those terms certainly indicates as wide a scope for the term "*agreement*" as the use of the same terms (omitting the word "*contract*") in the corresponding clauses of the 29 Car. II., which are, "No action shall be brought whereby to charge the defendant upon any *special promise* to answer for the debt, &c., of another person, &c., unless the agreement upon which such action shall be brought," &c. In *Smith v. Ide*, *supra*, decided in 1831, with *Wain v. Warlters*, and the other English, and several New York cases to the same effect, before the court, it was held, in a very elaborate opinion by Judge ROYCE, that our statute required that only the

promise of the party to be charged by it in the suit should be in writing. Our present statute (Gen. Stat. ch. 24), corresponding to 29 Car. II., c. 3, s. 4, is as follows: "S. 1. No action at law or in equity shall be brought in any of the following cases: 1st. To charge an executor, &c. 2d. To charge any person upon any special promise to answer for the debt, default, or misdoings of another. 3d. To charge any person upon any agreement made upon consideration of marriage. 4th. Upon any contract for the sale of lands, &c. 5th. Upon any agreement not to be performed within one year from the making thereof, unless the promise, contract, or agreement upon which such action shall be brought," &c. In that last clause the terms *promise*, *contract*, or *agreement* are used disjunctively and distributively, importing that each is used by repetition with reference to the same terms respectively in the five preceding clauses. The closing clause of the English statute has the term "*agreement*" only, which, of course, embraces all the three terms used in the preceding clauses. Now, it is plain that the term "*agreement*" is used in the same sense every time it is repeated in our original statute of 1822, and that it has no different meaning when used with reference to the limitation of performance within a year, from what it has when used with reference to actions on agreements or contracts for the debt of another. In the language of Judge ROYCE, in *Ide & Smith v. Stanton*, 15 Vt. 691, "It is synonymous with *special promise* or *undertaking*." It seems equally plain that the term "*agreement*" is used in our present statute in precisely the same sense as in the statute of 1822; and, therefore, the doctrine of the case of *Ide v. Smith*, *supra*, has direct application and full force. The idea of the separability of the correlative parts of the contracts embraced in the 1st section of our Statute of Frauds is recognised and illustrated in *Thayer v. Viles et al.*, 23 Vt. 497; also in *Hodges and Wife v. Green*, 28 Id. 358, and in several other similar cases. The same idea is most explicitly and fully presented in the very discriminating and able opinion in *Peirce v. Estate of Paine*. The plaintiff in that case, in pursuance of the agreement between himself and Paine, at once made purchase of the stock; but the transaction could not be consummated till the lapse of a year, so as to enable it to be determined whether Paine would be under obligation to pay Peirce anything, depending on the election that Peirce should then make; and, until

then, Paine was not to, and did not, derive any right or advantage from the transaction. He had received nothing. In no event was the contract, or his part of the contract, to be performed within a year. It was in view of this fact that the law was elaborated and applied to the effect that the action could not be maintained against Paine. But it is prominent for notice that Chief Justice REDFIELD says, "It is that portion of the agreement, or contract sued upon, which comes within the statute, by not being to be performed within the year, and not that portion of the agreement which constitutes the consideration of the promise sued upon." This is but treating the doctrine held in the case of *Ide v. Smith*, *supra*, as equally applicable to the 5th clause of the statute as to the second clause. It may be proper to remark, in passing, that what is thus shown as to the case of *Peirce v. Estate of Paine* shows that the learned annotator, in his note on *Peter v. Compton*, on p. 547, 1 Sm. Lead. Cas., ed. of 1866, was not quite accurate in saying that, in that case, "the question whether a contract must not be susceptible of performance on both sides within the year, in order to be valid without writing, arose in definite form, and was decided in the affirmative."

There are several cases in which it has been held that, when the contract on the part of either party can be performed within the year, the statute will not apply, although the other party cannot perform his part till after the expiration of a year. Under the decision in *Peirce v. Estate of Paine*, in connection with what has been held in other cases in this state, before referred to, we think that whether the statute applies or not depends on the question whether the suit is brought against the party that was to perform his part of the contract within a year. If it is so brought then the statute would not apply: but if brought against the party whose agreement was not to be performed within a year, then the statute would apply. As before intimated, there are cases in which the fact of performance by the party who was to perform within the year has been named and treated as affecting the applicability of the statute; in respect to which I presume to remark that in the first place, the statute does not in any respect make the right to maintain an action dependent upon the fact of performance by either party, but upon the intrinsic character of the contract, as to when, by its terms, the respective executory undertakings of the parties may be performed; or, in other words,

upon the capability of the agreement sued upon to be performed within a year. In the next place, in none of the cases in which the actual performance has been named as an element in the right to maintain the action, was that fact material for that purpose, so far as the effect of the statute was concerned. That fact would have been a necessary element in the plaintiff's right of recovery if there had been no statute. In *Donellan v. Reed*, 3 B. & Adol. 899, of course the plaintiff could not have recovered the stipulated additional rent, if he had failed to make the stipulated improvements. So too in *Blanding v. Sargeant*, 33 N. H. Rep. 239, the plaintiff could not have recovered if he had failed to do on his part that which laid the defendant under obligation to perform his agreement. And the same is true and is well illustrated by the line of discussion in *Holbrook v. Armstrong*, 10 Maine Rep. 31. The same is true of every conceivable case of like kind. In the case before us, as before remarked, the plaintiff had done that by way of adequate consideration which, independently of the statute, would have rendered the undertaking of the defendant valid and enforceable against him. Only that which was undertaken by the defendant was to be done within a year. That undertaking is here sued upon. His breach of it at once perfected his liability, and the plaintiff's right of action. Looking to the reason of the law, under the statute, this case stands for the same consideration as any case in which the cause of action should arise from the breach of an agreement that had no relation to the Statute of Frauds. Upon the occurring of such breach, the right of action would be perfected; but the party would be at liberty to delay bringing his suit to the last hour allowed by the Statute of Limitations without affecting the right to maintain the action. The purpose of the Statute of Frauds is to provide for a class of cases in which there cannot be an actionable breach within the specified time. That class embraces only agreements that are not to be performed within a year. Such agreements as may be wholly broken within the year, and thereby give a cause of action for such complete breach, do not fall within either the letter or the reason of the statute. The present case shows the matter in a strong light. The failure of the defendant to furnish the cow or the money, as he agreed to do, made an end of the whole arrangement, and left nothing further, either in act or time, to be done by either party towards the performance of the agreements on

either side. The plaintiff thereupon ceased to have anything thereafter to do as matter of obligation to the defendant. The defendant had nothing to do but to pay the damage caused by his breach of agreement; and that breach constituted a perfected cause and right of action in the plaintiff. This being so, the reason of the law under the statute no more had application and force than it would have had if the time for the performance of the agreement on both sides had been limited to a period short of a year from the making thereof, and the defendant has committed the same breach that he did in this case.

It is proper further to remark that in all the cases where the agreement has been held to be within the statute, the action was for the breach of that side of the contract that was not to be performed within the year: as *Boydell v. Drummond*, 11 East 142; *Bracegirdle v. Heald*, 1 B. & Ald. 727; *Peirce v. Estate of Paine*, *supra*; *Broadwell v. Getman*, 2 Denio 87. Without pursuing the subject further, the judgment is affirmed

The foregoing opinion can scarcely fail to be of interest to the profession, being upon the very important point, how far an action is maintainable upon one portion of a contract or agreement, when the other portion of it is confessedly within the Statute of Frauds, and so not enforceable by action, not being in writing. In Vermont, as stated in the opinion, it was decided at an early day (*Ide v. Smith*, 3 Vt. 290), that under that clause in the statute requiring contracts or agreements for the debt of another to be in writing, it was not requisite that the consideration of the contract should appear in the writing. This was a departure from the English construction: *Wain v. Warlters*, 5 East 10. But it has been adopted in a considerable number of the states, and, to the extent named, there is, perhaps, no question of the soundness of the decision upon which the relaxation of the rule in *Wain v. Warlters* proceeded. So, too, where but one side of a contract or agreement is within the statute, as a contract for the sale of land, for a price

agreed to be paid in money, and the portion within the statute has been performed, by conveying the land, there seems no ground to question the right to maintain an action for the recovery of the price stipulated, although we thereby give effect to one portion of the contract not in writing. But if the portion of the contract falling within the statute has not been reduced to writing, no action can be maintained on that portion of it because the other portion has been performed, as the payment, for instance, of the price of the land, or performance in any other mode: *Peirce v. Paine's Estate*, 28 Vt. 34, and cases cited. But it seems to us that there is no violation of the statute in allowing an action to be maintained on that portion of the contract, being the entire stipulation of one party, which is not within the statute, although the other portion of the contract could not have been enforced by action, as in the present case. Such have been the intimations of the English judges in some of the cases reported. But this must be

received with some qualification. We think it is scarcely allowable to hold that where the portion within the statute is the sole consideration of that which is not, and the judgment will impose the obligation of future performance of that portion of the contract within the statute, still an action will lie upon that portion which is not within the statute so soon as there shall be a breach of the same. Upon that view, if the price for the conveyance of land were agreed to be paid before the time of the conveyance, the party bound to convey, although not by contract in writing, might sue for the price, and the judgment would recognise the full validity of the entire contract, although not in writing. This seems to us the most obvious disregard both of the letter and spirit of the entire scope and effect of the statute. But in a case like the present, where the

defendant elects to disregard that portion of the contract not within the statute, by omitting performance of the portion which shall perfect the obligation of the other party, which will then be within the statute, it seems to us he has no ground of complaint because he is held responsible on the portion not within the statute, when he has by his own election carried it all without the statute, by electing not to perform on his own part, and thus releasing the plaintiff from performance of that portion not to be performed within the year. The contract then stands as if the defendant had stipulated that if he failed to perform on his own part, according to his stipulation, he would pay, immediately, and within one year, all damages, thus by his own election carrying the whole contract without the statute.

I. F. R.

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### *Supreme Court of Appeals of Virginia.*

#### BILLGERY v. BRANCH & SONS.

All species of contracts or commercial intercourse, whether direct or indirect, between subjects of different powers at war, are invalid.

The late contest between the United States and the Confederate States was a war.

The government of the Confederate States being a government *de facto* only, had jurisdiction and gave national character only to such parts of the territory of the several states as were under its actual control.

While therefore the city of New Orleans was under the authority of the Confederacy, its citizens were citizens of the Confederacy and enemies of the United States; but when the city passed into the hands of the Federal forces, it became again part of the United States, and its citizens became enemies to the Confederate States.

Where a citizen of Richmond drew a draft upon a citizen of New Orleans in 1862, after the capture of the latter city by the United States forces, and the payee, in February 1863, endorsed the draft to another, a citizen of Vicksburg, within the Confederate States, who held it until October 1863, and then presented it to drawee, at New Orleans, who refused payment, and the draft was then protested. *Held*, that this was an illegal act, and the holder could not recover.

This is so whether the contract be held void under the general rules of international law or under the Act of Congress of July 13th 1861.

Intercourse between Vicksburg and New Orleans being unlawful in October 1863, the presentment was not sufficient to justify protest and charging of the endorsers, even if the contract were originally lawful.

On the 26th day of August 1862, the Farmers' Bank of Virginia, having its office and transacting business at Richmond, Va., drew three several drafts, each for \$2000, and dated Richmond, payable to John Enders, or order, on the New Orleans Canal and Banking Company, a corporation having its principal office and transacting its business in New Orleans.

New Orleans passed under the permanent control of the Federal authority early in May 1862. Richmond remained under the control of the Confederates until April 1865. On the day of the drawing of these checks the Farmers' Bank had a credit of \$13,000 in the Canal Bank, created while both were within the Confederate lines; but this sum had been sequestered by an order of General Butler, of June 23d 1862, and was paid over to a Federal quartermaster, by order of General Banks, on the 26th of August 1863. These checks were endorsed by Enders to defendants, at what time did not appear, and in February 1863 they were endorsed by defendants and sold to plaintiff, who resided in Vicksburg, Miss. Directly after the purchase of them, Billgery returned to Vicksburg, where he remained until the capture of that place by the Federal forces, on the 4th of July 1863. In October 1863 he went to New Orleans, presented the checks to the Canal Bank, and, on its refusal to pay them, protested them, and notice of protest was duly deposited in the post-office in New Orleans, directed to defendants, Petersburg, Va. Early in 1865, some two weeks after Lee's surrender, Billgery wrote by mail to them also, at Petersburg, informing them of the non-payment of these checks, endorsed by them. The mails were then opened between Richmond and New Orleans, but defendants never received the letter.

Billgery brought his action on the case in the Circuit Court for the city of Richmond, declaring specially on the above state of facts, to which the defendants demurred and pleaded the general issue, and the case, by agreement, being heard before the court on the law and the facts, judgment was for defendants.

*Henry A. Wise*, for plaintiff in error.

*James Alfred Jones* and *W. W. Crump*, for defendants.



The opinion of the court was delivered by

JOYNES, J.—The counsel for the defendants have contended in the argument, 1. That the contracts arising out of the endorsement and delivery of the checks by the defendants to the plaintiff, were illegal and void, so that no action could be founded upon them, 2. That if these contracts were legal and valid, there has been no sufficient presentment and demand of payment of the checks, and, 3. That if the presentment and demand were sufficient, there has been no sufficient notice of dishonor.

Premising that a check is a bill of exchange, though subject to some peculiar rules, which need not now be adverted to, and that every endorsement of a bill is equivalent to the drawing of a new bill, I proceed to consider the first and principal question.

It is a general principle of law, that war operates as an interdiction of all commercial and other pacific intercourse and communication with the public enemy, and it follows as a corollary from this principle, that every species of private contract made with subjects of the enemy, during war, is unlawful. "The rule thus deduced," says Wheaton, "is applicable to insurance on enemy's property and trade, to the drawing and negotiating of bills of exchange between subjects of the powers at war, to the remission of funds, in money or bills, to the enemy's country, to commercial partnerships entered into between the subjects of the two countries, after the declaration of war, or existing previous to the declaration, which last are dissolved by the mere force and act of the war itself, although as to other contracts [existing before the war], it only suspends the remedy:" Wheaton Elements by Lawrence 556. So 1 Kent 67-8. The same great jurist uses this language in *Griswold v. Waddington*, 16 John. R. 483. "There is no authority in law, whether that law be national, maritime, or municipal, for any kind of private, voluntary, unlicensed business, communication, or intercourse with an enemy. It is all noxious, and, in a greater or less degree, is all criminal. Every attempt at drawing distinctions has failed; all kind of intercourse except that which is hostile, or created by the mere exigency of the war and necessity of the case, is illegal. The law has put the sting of disability into every kind of voluntary communication and contract with an enemy, which is made without the special permission of the government. There is wisdom and policy, patriotism and safety, in this principle, and every relaxation of it tends to

corrupt the allegiance of the subject and prolong the calamities of war.

The idea that any remission of money may be lawfully made to an enemy, is repugnant to the very rights of war, which require the subjects of one country to seize the effects of the subjects of the other. The property so remitted, if in cash or any tangible subject, would become a just cause of seizure while on its passage. An alien enemy has no right of action during war, and he cannot sue, because it would be drawing resources out of the country; how then can it be lawful to make remittances to him? The law that forbids intercourse and trade, must equally forbid remittances and payment." See Halleck Int. Law, 356 *et seq.*; Note to *Clementson v. Blessig et al.*, 11 Exch. R. 185, s. c. 32 Eng. L. & Eq. 544.

In *Willison v. Patteson et al.*, 7 Taunt. 489 (2 Eng. C. L. R. 169), s. c. 1 J. B. Moore 183 (which latter report of it I will cite, as it is much fuller and better in every way than the other), was an action of assumpsit on three bills of exchange accepted by the defendants, and endorsed to the plaintiff. The bills were drawn at Dunkirk in France by Michelin, a subject of France resident there, payable to his own order, three months after date, upon the defendants, British subjects resident in London, who were the holders of certain cambrics shipped to them, by Varlet of Dunkirk, and by him assigned to Michelin. The bills were accepted, payable when the cambrics should be sold, which was subsequently done. The bills were endorsed by Michelin, the drawer, to the plaintiff, an English born subject, then and still a resident of Dunkirk. At the time these bills were drawn, endorsed, and accepted, France and England were at open war with each other. The action was brought after the return of peace, and the court held that it could not be maintained. GIBBS, C. J., in giving the reasons of his judgment, said: "It is illegal for an alien, in an enemy's country, during war, to draw a bill on a subject resident in this, and then sue him here for the amount of such bill, on the restoration of peace. It gives rise to a communication between subjects of both countries which ought to be avoided. The drawing and accepting of these bills are in themselves illegal." PARK, J., after quoting the rule *ex natura belli commercia inter hostes cessare non est dubitandum*, adds: "Although the evidence of trading is not conclusive, it is still a trading." \* \*

"Though the plaintiff might be in ignorance of the circumstances attending these bills, still he receives them from the drawer, and must, therefore, be fully aware that they were a species of contract, originating with an alien enemy." BURROUGH, J., said: "It was the object of the drawer in the present case, who was an alien, to obtain money from the acceptors, who were resident in this country; the drawer having assigned [consigned?] the cambrics to the acceptor for sale, is entitled to the money arising on the bills. Can it be contended, that if the cambrics had been sold, Michelin could have maintained an action for money had and received? If not, he could, by no device, obtain it from this country. If, therefore, the action for money had and received could not be maintained by Michelin, being an alien enemy, can he possibly transfer his interest to another, which interest will ultimately revert to his benefit?" In *Willison v. Patteson* there was an actual communication had, and a contract directly made, between subjects of the hostile powers, inasmuch as the bill was sent over from France to England for acceptance, and was accepted. But it is not necessary that any such actual communication should take place in order to vitiate the contract of the drawer or endorser of a bill. When a man draws a bill upon another, and negotiates it, he in substance and fact despatches a communication to him, directing him to pay the money to the owner of the bill. The drawing and negotiation of the bill have a direct tendency to bring about actual intercourse and communication, because the bill cannot otherwise perform its office. And upon general principles, any contract is unlawful which has a tendency to promote and encourage the doing of an act which the law condemns and forbids, whether, in any particular case, the act be really done or not. Upon this ground, the vice attaches to the drawing and negotiation of the bill. The other ground of decision stated by BURROUGH, J., namely, that the bill is an attempt by the drawer to transfer to another a right to demand and receive money which he could not lawfully demand himself, leads to the same result. Obviously, if the drawer may lawfully draw for his funds in the hands of the drawee, the drawee may lawfully pay the drafts, or remit the funds. But, as we have seen, the payment or remittance of money by a subject or citizen of one belligerent to a subject or citizen of the other, during war, is unlawful: *Griswold v. Waddington*, *supra*.

But it was contended, with great earnestness and ability, by the counsel for the plaintiff, that the rights of the parties in this case must be determined with reference to the municipal law alone; that the late conflict between the United States and the Confederate States was not *a war*, in the legal sense, and did not produce the effects of a war upon the rights and relations of citizens; that on the part of the Confederate States, it was nothing more than an insurrection or rebellion against the lawful authority of the United States, and on the part of the United States was only an exertion of force to suppress the insurrection; and that the principles of international law, applicable to a state of war *inter gentes*, cannot properly be resorted to for the determination of any question between citizens arising out of that conflict, or affected by it. It was further argued, that the only restriction upon intercourse during the war was that imposed by the Act of Congress of July 13th 1861, and the proclamation of August 16th 1861, which was merely a suspension, for a time, of the right of free intercourse guaranteed by the Constitution, and that the existence of the conflict between the government and the insurgents, and the suspension of intercourse during its existence, did not deprive any citizen of the right to draw a bill of exchange upon another citizen, or any other citizen of the right to purchase such a bill, even though the drawer and drawee were on opposite sides of the conflict, such acts not involving any actual locomotive intercourse, which would alone violate the prohibition against intercourse; and that in order to defeat a recovery in this case, it was incumbent on the defendants to establish that there has been a violation of that prohibition.

I shall not enter upon a discussion of the theory and principles of the Constitution of the United States, or of the respective rights and powers of the Federal and State governments, for the purpose of determining the political and constitutional character and consequences of the late unhappy conflict. Fortunately, such a discussion is not necessary. The principles of law which are to be applied to the solution of the question now before us seem to me to have been fully settled by the Supreme Court of the United States. I do not think it necessary to cite the decisions of any inferior tribunal, and shall cite only a few cases in the Supreme Court.

The subject of the late war first came before the Supreme Court

in *The Prize Cases*, 2 Black R. 635, decided at December Term 1862. These cases involved the validity of certain captures for breach of the blockade established by President Lincoln in April 1861, at a time when no legislation had been had by Congress in reference to the war. Four vessels were involved, two of which belonged to neutrals, and two to citizens of Richmond, Va. Two questions were discussed and decided by the court: 1. Had the President a right to institute a blockade of ports in the possession of persons in armed rebellion against the government, on the principles of international law? 2. Was the property of persons domiciled or residing within the states in rebellion a proper subject of capture on the sea as "enemies' property?"

The court, after observing that the right of prize and capture depended on the *jus belli*, proceeded to inquire whether, at the time of the blockade, a state of war existed between the United States and the insurgents. If the relations existing under the Constitution between the government and the insurgents had the effect of rendering it impossible that a conflict between them could be a *war*, in the legal sense, and of restricting the government to the use of means provided by the municipal law for the suppression of an insurrection, then the blockade was not lawfully instituted. In order, therefore, to determine the validity of a blockade it was necessary to determine what was the legal character of the relations existing between the parties to the conflict. The following extracts from the opinion exhibit the views of the court.

"A civil war breaks the bonds of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. These two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest, and have recourse to arms." "The true test of the existence of civil war, as found in the writings of the sages of the common law, may be thus summarily stated: When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, civil war exists, and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land." "It is

not the less a civil war with belligerent parties in hostile array, because it may be called an insurrection by one side, and the insurgents be considered as rebels or traitors."

Pursuing these views, and others which need not be adverted to, the court held that there existed between the government of the United States and the insurgents a state of civil war in the sense of international law, which brought with it the common incidents of war, and among them the right to institute a blockade. The views of the court upon the second question will appear from the following extracts: "The appellants contend that the term 'enemy' is properly applicable to those only who are subjects or citizens of a foreign state at war with our own." \* \* \* "They contend also that insurrection is the act of individuals, and not of a government or sovereignty; that the individuals engaged are subjects of law; that confiscation of their property can be effected only under a municipal law; that by the law of the land such confiscation cannot take place without the conviction of the owner of some offence; and finally, that the secession ordinances are nullities, and ineffectual to release any citizen from his allegiance to the national government, and consequently that the constitution and laws of the United States are still operative over persons in all the states for punishment as well as protection." The court proceeded to show that the claim of sovereignty on the part of the United States did not prevent the exercise of belligerent rights or the existence of belligerent relations, and added, "All persons who reside within the [insurgent] territory whose property may be used to increase the revenues of the hostile power, are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their government, and are none the less enemies because they are traitors."

The four dissenting judges held that war, in the legal sense, did not exist at the time the blockade was instituted, because it had not been declared by Congress. They held that prior to the Act of Congress of July 13th 1861, the President could only exercise the power given to him by the municipal laws, his operations being limited to the suppression of an insurrection, but that Congress could bring into operation the war power, and thus change the nature and character of the contest, and that after such action by Congress, instead of being carried on under the

municipal law, it would be carried on under the law of nations, and the Acts of Congress as war measures, with all the rights of war: p. 692. They not only held that such a contest, after the action of Congress, would give to the government the rights of war under the international law, but that it would likewise be attended with the consequences of war in respect to the rights and relations of citizens: pp. 688, 693. On p. 687 the consequences of a state of war, according to international law, are stated. They are referred to as consequences which must result from regarding the pending conflict as a civil war. The judge says: "The people of the two countries become immediately the enemies of each other—all intercourse, commercial or otherwise, unlawful—all contracts existing at the commencement of the war suspended, and all made during its existence utterly void. The insurance of enemy's property—the drawing of bills of exchange, or the purchase [of bills] on the enemy's country—the remission of bills or money to it, are illegal and void. Existing partnerships between citizens or subjects of the two countries are dissolved, and in fine, interdiction of trade and intercourse, direct or indirect, is absolute and complete, by the mere force and effect of war itself." The only point upon which the minority differed from the majority was, in respect to the time at which the conflict assumed the character of a war, in the legal sense. The majority held that the conflict had become a war by the mere course of events, and without any action by Congress, while the minority held that the action of Congress was indispensable to give it that character. But there was no difference of opinion in respect to the legal consequences resulting from the state of war, whenever the conflict assumed that character.

In *The Venice*, 2 Wall. R. 258, the court say: "While these transactions were in progress the war was flagrant; the states of Louisiana and Mississippi were wholly under rebel dominion, and all the people of each state were enemies of the United States. The rule which declares that war makes all the citizens or subjects of one belligerent enemies of the government and of all the citizens or subjects of the other, applies equally to civil and international wars." This relation of mutual enmity is one of the fundamental conditions of a state of war. It is part of a system of rules for the government of men in a state of war, which is founded in necessity, and which has been established by common consent

throughout the world. That system, as we have seen, subjects individuals to restraints and disabilities in respect to their acts and contracts, which are unknown in time of peace. The relation of the citizens of the several states, under the Constitution, is that of friends—the relation between citizens on opposite sides in the late war, was that of enemies. The relations under the Constitution were suspended and superseded for the time, by new relations under the laws of war. And so the rights and privileges existing under the Constitution, in respect to intercourse and contracts, were, of necessity, displaced and superseded, for the time, by the restraints and disabilities which resulted from the state of war.

In *The Hampton*, 5 Wallace R. 372, the vessel was captured in a creek in the state of Virginia, and was libelled and condemned as prize of war, upon the principles of international law. Brinkley, a loyal citizen, appeared and claimed the vessel as mortgagee. The *bona fides* of the mortgage was not disputed, nor was it disputed that he was a loyal citizen. The precise offence for which the vessel was libelled is not stated in the report, but it was conceded that the vessel might have been condemned under the Act of July 13th 1861. The offence, therefore, was one embraced by that act, which provides that goods, &c., coming from or going to a state in insurrection, by land or water, along with the vessel, &c., in which they are, shall be forfeited.

It was held that the vessel was properly condemned under the international law, which was not suspended by the Act of Congress; and that notwithstanding the loyalty of the mortgagee, and the fairness of his debt, his right was forfeited upon the principles of international law, though it would have been saved if the condemnation had taken place under the Act of Congress.

The court therefore decided—1. That intercourse during the late war was unlawful upon the principles of international law, and independently of the Act of Congress. And 2. That the effect of the international law was to override and extinguish the claim of a loyal citizen under a *bona fide* mortgage.

In *The William Bagaly*, 5 Wallace R. 377, Brogden, who claimed a share of the vessel and cargo, was a loyal citizen, resident in Indiana. At the breaking out of the war he was a member of a mercantile partnership in Mobile, which owned the vessel and cargo. He never aided the rebellion—never, after the



rebellion began, exercised any control or ownership over the vessel or cargo, and had no connection with or knowledge of the unlawful voyage which occasioned the capture. In consequence of his loyalty to the United States, his interest in the partnership effects had been confiscated by the Confederate government. His claim was rejected. The court held, among other things, that the effect of the war was to dissolve the partnership existing between the claimant and the parties in Mobile, and that it was his duty promptly to dispose of and withdraw his interest, and that by his failure to do so, his interest became liable to be treated as enemy's property. These propositions were based exclusively on the principles applicable to international wars. The court further recognised the principle applicable to war *inter gentes*, that an executory contract with a citizen or subject of the enemy, if it cannot be performed except in the way of commercial intercourse with the enemy, is *ipso facto* dissolved, as equally applicable to the late war.

In *Hanger v. Abbott*, 6 Wallace R. 532, the principles of law applicable to a state of war *inter gentes*, were applied to the late civil war, to determine whether the Statute of Limitations of Arkansas ran during the war against a cause of action held at the commencement of the war by citizens of New Hampshire against a citizen of Arkansas.

In the opinion of the court, the ordinary consequences of a war *inter gentes*—the prohibition of intercourse—the dissolution of partnerships—the prohibition of contracts made during the war, and the suspension or dissolution of contracts made before the war—the right to confiscate debts due to citizens or subjects of the enemy—the suspension of the remedy for the recovery of debts, and the restoration of the remedy upon the return of peace—were fully stated, and were recognised as equally applicable to the late civil war.

It was accordingly held that the Act of Limitations did not run during the war. And this decision was placed exclusively upon the principles of international law, applicable to a state of war *inter gentes*.

These decisions of the Supreme Court settle beyond question, that the late conflict between the United States and the Confederate States was a war, in the legal sense, with all the incidents and consequences of a war, as they are known to the international

law; that accordingly all the citizens on one side were enemies of all the citizens on the other, and that all commercial or other pacific intercourse or communication between them, unless specially authorized, was unlawful to the same extent and for the same reasons as in a war *inter gentes*; and that in order to determine how the contracts of individual citizens were affected by the late war, recourse must be had to the general principles applicable to a state of war, as they are found in the international code.

This doctrine by no means involves a recognition of the Confederate States as a political sovereignty. The concession by the government of belligerent rights to the Confederate States, and the application by the courts of the general laws of war to the determination of questions arising out of the late conflict, only recognise the existence of a conflict of such magnitude, and with such an array of strength, that it could not be dealt with otherwise than as a war; they involve no concession of political rights to the association of states which carried on the conflict.

Nor does the fact that Louisiana was one of the Confederate States, and that the city of New Orleans was to the last claimed by the Confederate States as belonging to them, afford any ground for refusing to apply the law of war to their case. The checks were drawn and endorsed after the city of New Orleans had passed under the permanent dominion and control of the United States. Its relations to the Confederate States, which were only a government *de facto*, and whose authority was therefore dependent upon the exercise of power, and not upon the existence of right, was then broken up and destroyed. From that time we must regard New Orleans as belonging to the Federal side of the conflict, and its citizens as enemies of the citizens of the other belligerent: 6 Wallace 521 and cases cited. Nor does it make any difference that the plaintiff and defendant were, all of them, citizens of the Confederate States, if, as claimed by the defendants, the contract between them was in violation of the common law of the civilized world.

I do not think it necessary to consider whether, as contended by the counsel for the plaintiff, the Act of Congress of July 13th 1861, and the proclamations of the President in pursuance of it, prohibiting commercial intercourse, were a law to the parties to this suit, at the date of their contract, all of whom were then citizens and residents of the Confederate States. If they were,

it would not follow, as contended by the counsel, that actual locomotive intercourse was necessary in order to affect the contract between these parties. Such actual locomotive intercourse accomplished or attempted, would doubtless be necessary, as under the general law of war, to subject property to forfeiture. But the prohibition of intercourse thus made by Congress, must be construed with reference to the object it was designed to effect, and so enforced as to accomplish the policy on which it was founded. It was obviously dictated by the same policy and designed to effect the same ends as the like prohibition in the international law, and any contract which would be regarded as a violation of the one, ought to be regarded as a violation of the other. But even if this Act of Congress did not operate as a law to the parties to this suit, at the date of their contract, I apprehend that no court of the United States or of a state should lend its aid for the enforcement of a contract, made in violation of the policy of that act. This court must deal with this case just as a court of the United States would deal with it.<sup>1</sup>

The argument that Billgery had a right, which was guaranteed to him by the Constitution, to go to New Orleans at his pleasure, which was only suspended by the war, seems to me to have no force. The suspension was accompanied by an absolute interdict of all commercial intercourse in the mean time, and a consequent disability to enforce any contract made during the war, which

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<sup>1</sup> *Note by Judge Joynes.*—Substantially the same question involved in this case was decided by Chief Justice CHASE, in the Circuit Court, at Richmond, June 1868, in the case of *Moore & Bro. v. Foster & Moore*, of which I have obtained an authentic account since this opinion was delivered.

The action was brought to recover the amount of certain negotiable notes. The defendants pleaded payment and accord and satisfaction, and to sustain their defence gave in evidence a draft drawn by the Bank of North Carolina, at its branch in Winslow, in that state, on the branch of the Bank of Virginia at Portsmouth, bearing date the 10th day of December 1862, which draft, it was contended, was delivered by the defendants to the plaintiffs, and accepted by them in payment of the debt. At the date of the draft, Portsmouth was in the permanent occupation and control of the forces of the United States, but the condition of Winslow in that respect was a subject of dispute. The Chief Justice instructed the jury, "that if they should find that Winslow was not, at the time of the making and issuing of the draft, in the occupation or control of the national forces, then the draft in controversy, being an act of prohibited commercial intercourse, was not valid negotiable paper." Whether Winslow was so occupied or controlled, he left to the jury.

tended to produce a violation of that interdict. The interdict was as absolute, while it lasted, and as fatal to all contracts in violation of its policy, as if it had been perpetual, or as if there had been no such general right of intercourse under the Constitution.

It was argued, too, that Billgery might have intended to keep these checks until it should become lawful to present them for payment, and that the court ought rather to presume a lawful than an unlawful intent. I doubt whether a party who makes a contract during war, which, upon its face, and according to the usual intent and import of such contracts, is a violation of the policy of non-intercourse, ought to be allowed to say that he did not design any such violation. It would be difficult to determine whether such an averment was founded in truth, and to permit such defences to be alleged, would cripple the efficiency of the rule, which, we are told, admits no exception (6 Wallace R. 535), and which declares "a strict and rigorous" policy, which no artifice is permitted to evade.

But what are the facts? Billgery parted with his money to Branch & Sons, in February 1863. He would necessarily lose interest until he could collect the money on the checks. He has been examined as a witness, as have also the only two of the defendants who were cognisant of the transaction. Neither of them testifies that there was any understanding or expectation that the presentment of the checks would be withheld, much less any contract that they should be withheld until it should be lawful to present them. On the contrary, John P. Branch, who conducted the transaction with Billgery, shows his understanding and expectation, when he says that he "judged Billgery to be a blockade-runner." And not only does Billgery nowhere say that there was any understanding with Branch, or any intention on his own part, that presentment would be delayed, but he admits that after he bought the checks, he tried to find somebody by whom he could send them to New Orleans for collection, but could not. The checks indeed seem to have remained in Virginia from August 1862, when they were drawn, to February 1863, when they were sold to Billgery. But that fact throws no light on the contract between Billgery and Branch & Sons. It may be accounted for by supposing that nobody had been found, in that interval, who wanted funds in New Orleans, or who would pay enough for them.

When we remember how much activity and enterprise were displayed during the war in "running the blockade," and the large profits that were made by it, we should require pretty strong proof to convince us that a party who drew a sight draft on a point where Federal money was to be had, contemplated that it would be withheld from presentment for the indefinite period of the war, or that a party who laid out a large sum in the purchase of such a draft, intended so to withhold it.

It follows from these views that, upon the evidence, judgment was properly rendered for the defendants. They also show that the demurrers to the special counts were properly sustained. Each of these counts sets out the drawing of a check by a bank in Richmond upon a bank in New Orleans, and the endorsement of the check by the defendants to the plaintiff, at periods when we know that the war was flagrant, and all commercial and other intercourse between Richmond and New Orleans were unlawful.

But even if the contract could be held valid, there is another ground which is fatal to the case of the plaintiff, both upon the pleadings and the evidence. In order to charge the defendants as endorsers, it was necessary that the checks should be presented to the Canal Bank, and payment thereof demanded, and, in case of dishonor, that due notice thereof should be given to the defendants. The only presentment and demand set out in the pleadings, or proved by the evidence, were made on the 27th day of October 1863, when all commercial intercourse between Vicksburg, where the plaintiff resided, and New Orleans, where the checks were payable, was unlawful. By the proclamation of the President dated August 16th 1861, prohibiting intercourse with the states in rebellion, an exception was made of "such parts of states as may be from time to time occupied and controlled by forces of the United States engaged in the dispersion of the insurgents." This exception is set out in the amended declaration and was relied on in the argument, as authorizing Billgery to go to New Orleans after the fall of Vicksburg. But this exception was repealed by the proclamation of April 2d 1863. That proclamation declared the same states to be in insurrection, and revoked all the exceptions made in the former proclamation, but again made certain local exceptions, of which "the port of New Orleans" was one. This proclamation declares "that all commercial intercourse not licensed and conducted as is provided in said act, between the said states

and the inhabitants thereof, with the exceptions aforesaid, is unlawful, and will remain unlawful until such insurrection shall cease or has been suppressed, and notice thereof has been given by proclamation." Vicksburg was not excepted from the operation of this proclamation, so that commercial intercourse, except with the license of the President, between Vicksburg and New Orleans was unlawful at the time at which presentment of these checks was made. The license given to Billgery by the military authorities was a nullity: *Ouachita Cotton*, 6 Wall. R. 521. The demand of payment, therefore, which was made, was one which the plaintiff could not lawfully make, and which the Canal Bank could not lawfully comply with. A demand to charge the endorsers should have been one which the Bank might lawfully have complied with.

In respect to the question of notice of dishonor, very little need be said. To give any effect to the notice deposited in the post-office in New Orleans in October 1863, it should at least have been shown that the law, or a general usage, required that the letter containing the notice should be preserved by the postmaster until the restoration of intercourse, and then forward it to its destination. In the absence of such proof, the deposit of a notice in the post-office at New Orleans, addressed to Petersburg, in the midst of the war, was of no avail. It is not necessary to express an opinion as to whether the evidence is sufficient to prove that due notice was given to the defendants after the close of the war.

Upon the whole, I am of opinion that the judgment ought to be affirmed.

MONCURE, P., concurred.

RIVES, J., dissented.

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*Supreme Court of Wisconsin.*

**EMMA SCHNEIDER v. THE PROVIDENT LIFE INSURANCE CO.**

An "accident" within the meaning of a policy of insurance means an event which happens from some external violence or *vis major*, and which is unexpected, because it is from an unknown cause, or is an unusual result of a known cause.

Negligence of the person injured does not prevent it from being an accident.

Therefore in an action on a policy of insurance against accident, the negligence of the insured is no defence.

A policy of insurance against accident contained a clause against liability for

injury resulting from the assured "wilfully and wantonly exposing himself to any unnecessary danger." The assured attempted to get on a train of cars while in slow motion, and fell and was killed. *Held*, that the negligence was not wilful or wanton, and the company were liable.

THIS was an action on a policy, by which Bruno Schneider was insured against injury or death by accident. The policy contained a clause that the company should not be liable for any injury happening to the assured by reason of his "wilfully and wantonly exposing himself to any unnecessary danger or peril."

The assured attempted to get on a train of cars after it had started, but was moving slowly, but fell and was killed. On the trial the plaintiff was nonsuited, on the ground that the evidence showed the case to be within the exception as to wilful exposure to danger.

The opinion of the court was delivered by

PAINE, J.—The position most strongly urged by the respondent's counsel in this court, was that inasmuch as the negligence of the deceased contributed to produce the injury, therefore the death was not occasioned by an accident at all, within the meaning of the policy. I cannot assent to this proposition. It would establish a limitation to the meaning of the word "accident" which has never been established either in law or in common understanding. A very large proportion of those events which are universally called accidents happen through some carelessness of the party injured, which contributes to produce them. Thus men are injured by the careless use of firearms, of explosive substances, of machinery, the careless management of horses, and in a thousand ways, when it can readily be seen afterwards that a little greater care on their part would have prevented it. Yet such injuries having been unexpected and not caused intentionally or by design, are always called accidents, and properly so. Nothing is more common than items in the newspapers under the heading, "Accidents through carelessness."

There is nothing in the definition of the word that excludes the negligence of the assured party as one of the elements contributing to produce the result. An accident is defined as "an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause; or is an unusual effect of a known cause, and therefore not expected."

An accident may happen from an unknown cause. But it is not essential that the cause should be unknown. It may be an unusual result of a known cause, and therefore unexpected to the party. And such was the case here, conceding that the negligence of the deceased was the cause of the accident.

It is true that accidents often happen from such kinds of negligence. But still it is equally true that they are not the usual result. If they were, people would cease to be guilty of such negligence. But cases in which accidents occur are very rare in comparison with the number in which there is the same negligence without any accident. A man draws his loaded gun toward him by the muzzle—the servant fills the lighted lamp with kerosene, a hundred times without injury. The next time the gun is discharged, or the lamp explodes. The result was unusual, and therefore unexpected. So there are undoubtedly thousands of persons who get on and off from cars in motion without accident, where one is injured. And therefore when an injury occurs it is an unusual result, and unexpected, and strictly an accident. There are not many authorities on the point. The respondent's counsel cites *Theobald v. The Railway Passengers' Assurance Co.*, 26 E. Law & Eq. 432, not as a direct authority, but as containing an implication that the negligence of the injured party would prevent a recovery. I do not think it can be construed as conveying any such intimation. The insurance there was against a particular kind of accident; that was a railway accident, and the only question was, whether the injury was occasioned by an accident of that kind. The court held that it was, and although it mentions the fact that there was no negligence on the part of the assured, that cannot be considered as any intimation what would have been the effect of negligence if it had existed.

The general question as to what constituted an accident was considered in two subsequent cases in England. The first was *Sinclair v. The Maritime Passengers' Assurance Co.*, 3 El. & El. 478 (E. C. L. R. vol. 107), in which the question was, whether a sunstroke was an accident within the meaning of the policy. The court held that it was not, but was rather to be classed among diseases occasioned by natural causes, like exposure to malaria, &c., and while admitting the difficulty of giving a definition to the term accident which would be of universal application, they say they may safely assume "that some violence, casualty, or *vis major*



is necessarily involved." There could be no question in this case that all these were involved.

In the subsequent case of *Trew v. Railway Passengers' Assurance Co.*, 6 Hurl. & Nor. 839, the question was, whether a death by drowning was accidental. The counsel relied on the language of the former case, and urged that there was no external force or violence. But the court held that if the death was occasioned by drowning, it was accidental within the meaning of the policy. And in answer to the argument of counsel they said: "If a man fell from a housetop, or overboard from a ship, and was killed; or if a man was suffocated by the smoke of a house on fire, such cases would be excluded from the policy, and the effect would be, that policies of this kind, in many cases where death resulted from accident, would afford no protection whatever to the assured. We ought not to give to these policies a construction which will defeat the protection of the assured in a large class of cases."

There was no suggestion that there was any question to be made as to the negligence of the deceased, and yet the court said: "We think it ought to be submitted to the jury to say whether the deceased died from the action of the water, or natural causes. If they are of the opinion that he died from the action of the water, causing asphyxia, that is a death from external violence within the meaning of the policy, whether he swam to a distance and had not strength enough to regain the shore, or on going into the water got out of his depth."

Now either of these facts would seem to raise as strong an inference of negligence as an attempt to get upon cars in slow motion. Yet the court said that although the drowning was occasioned by either one of them, it would have been a death within the meaning of the policy, and the plaintiffs entitled to recover. I cannot conceive that it would have made such a remark except upon the assumption that the question, whether the injured party was guilty of negligence contributing to the accident, does not arise at all in this class of cases. I think that is the true conclusion, both upon principle and authority, so far as there is any upon the subject; and the only questions are, first, whether the death or injury was occasioned by an accident within the general meaning of the policy, and if so, whether it was within any of the exceptions.

This conclusion is also very strongly supported by that provision of the policy under which the plaintiff was nonsuited. That

necessarily implies that any degree of negligence falling short of "wilful and wanton exposure to unnecessary danger" would not prevent a recovery. Such a provision would be entirely superfluous and unmeaning in such a contract, if the observance of due care and skill on the part of the assured constituted an element to his right of action, as it does in actions for injuries occasioned by the negligence of the defendant.

The question therefore remains whether the attempt of the deceased to get upon the train was within this provision, and constituted a "wilful and wanton exposure of himself to unnecessary danger?" I cannot think so. The evidence showed that the train having once been to the platform, had backed so that the cars stood at some little distance from it; while it was waiting there the deceased was walking back and forth on the platform (of the depot). It is very probable that he expected the train to stop there again before finally leaving. But it did not. It came along, and while moving at a slow rate, or as fast as a man could walk, he attempted to get on and by some means fell either under or by the side of the cars and was crushed to death. The act may have been imprudent. It may have been such negligence as would have prevented a recovery in an action based upon the negligence of the company if there had been any. But it does not seem to have contained those elements which could be justly characterized as wilful or wanton. The deceased was in the regular prosecution of his business. He desired and expected to leave on that train. Finding that he would be left unless he got on while it was in motion, it was natural enough for him to make the attempt. The strong disinclination which people have to being left, would impel him to do so. The railroad employees were getting on at about the same time. Imprudent though it is, it is a common practice for others to get on and off in the same manner. He had undoubtedly seen it done, if he had not done it himself, many times without injury. I cannot regard it, therefore, as a wilful and wanton exposure of himself to unnecessary danger within the meaning of the policy.

The judgment is reversed, and a *venire de novo* awarded.

*Supreme Court of the United States.*

WILLIAM WARD ET AL. v. FRANCIS L. SMITH.

The fact that an instrument is made payable at a bank does not make the bank an agent of payee to receive payment, unless he actually deposits the instrument there, or in some express manner authorizes the bank to act for him.

When an instrument is lodged with a bank for collection, the bank becomes the agent of the payee or obligee to receive payment. The agency extends no further, and without special authority an agent can only receive payment of the debt due his principal in the legal currency of the country, or in bills which pass as money at their par value by the common consent of the community.

The doctrine that bank bills are a good tender unless objected to at the time, only applies to current bills which are redeemed at the counter of the bank, and pass at par value in business transactions in the place where offered.

Payment of a check in the bills of a suspended bank, not known to the parties to be suspended, is not a satisfaction.

Where the debtor and the creditor's known agent to receive the money, reside in the same jurisdiction, the fact that the creditor is a citizen of a power at war with the debtor's government, and resident in the hostile state, does not absolve the debtor from his obligation to pay, and if he does not, he is liable for interest.

In error to the Circuit Court of the United States for the District of Maryland.

In August 1860, the plaintiff in error, William Ward, purchased of Smith certain property in Virginia, and gave him for the consideration-money the three joint and several bonds of himself and co-defendant, upon which the present action was brought. These bonds, each for a sum exceeding four thousand dollars, bear date of the 22d of that month, payable, with interest, in six, twelve, and eighteen months after date, "at the office of discount and deposit of the Farmers' Bank of Virginia, at Alexandria."

In February 1861 the first bond was deposited at the bank designated for collection. At the time there was endorsed upon it a credit of over five hundred dollars; and it was admitted that subsequently the further sum of twenty-five hundred dollars was received by Smith, and that the amount of certain taxes on the estate purchased, paid by Ward, was to be deducted.

In May 1861, Smith left Alexandria, and remained within the Confederate military lines during the continuance of the civil war. He took with him the other two bonds, which were never deposited at the Farmers' Bank for collection. Whilst he was thus absent from Alexandria, Ward deposited with the bank to his credit, at different times between June 1861 and April 1862, various sums

in notes of different banks of Virginia, the nominal amount of which exceeded by several thousand dollars the balance due on the first bond. These notes were at a discount at the times they were deposited, varying from eleven to twenty-three per cent. The cashier of the bank endorsed the several sums thus received as credits on the first bond; but he testifies that he made the endorsement without the knowledge or request of the plaintiff. It was not until June 1865 that the plaintiff Smith was informed of the deposits to his credit, and he at once refused to sanction the transaction and accept the deposits, and gave notice to the cashier of the bank and the defendants of his refusal. The cashier thereupon erased the endorsements made by him on the bond.

The defendants (plaintiffs in error) claimed that they were entitled to have the amounts thus deposited and endorsed credited to them on the bonds, and allowed as a set-off to the demand of the plaintiff. They made this claim upon these grounds: That by the provision in the bonds, making them payable at the Farmers' Bank, in Alexandria, the parties contracted that the bonds should be deposited there for collection either before or at maturity; that the bank was thereby constituted—whether the instruments were or were not deposited with it—the agent of the plaintiff for their collection; and that as such agent it could receive in payment equally with gold and silver the notes of any banks, whether circulating at par or below par, and discharge the obligors.

*A. G. Browne and F. W. Brune*, for plaintiffs in error.

*R. J. & J. L. Brent*, for defendants in error.

FIELD, J. [after reciting the facts].—It is undoubtedly true that the designation of the place of payment in the bonds imported a stipulation that their holder should have them at the bank when due to receive payment, and that the obligors would produce there the funds to pay them. It was inserted for the mutual convenience of the parties. And it is the general usage in such cases for the holder of the instrument to lodge it with the bank for collection, and the party bound for its payment can call there and take it up. If the instrument be not there lodged, and the obligor is there at its maturity with the necessary funds to pay it, he so far satisfies the contract that he cannot be made responsible for any

future damages, either as costs of suit or interest, for delay. When the instrument is lodged with the bank for collection, the bank becomes the agent of the payee or obligee to receive payment. The agency extends no further, and without special authority an agent can only receive payment of the debt due his principal in the legal currency of the country, or in bills which pass as money at their par value by the common consent of the community. In the case at bar, only one bond was deposited with the Farmers' Bank. That institution, therefore, was only agent of the payee for its collection. It had no authority to receive payment of the other bonds for him or on his account. Whatever it may have received from the obligors to be applied on the other bonds, it received as their agent, not as the agent of the obligee. If the notes have depreciated since in its possession, the loss must be adjusted between the bank and the depositors; it cannot fall upon the holder of the bonds.

But even as agent of the payee of the first bond, the bank was not authorized to receive in its payment depreciated notes of the banks of Virginia. The fact that those notes constituted the principal currency in which the ordinary transactions of business were conducted in Alexandria, cannot alter the law. The notes were not a legal tender for the debt, nor could they have been sold for the amount due in legal currency. The doctrine that bank bills are a good tender unless objected to at the time, on the ground that they are not money, only applies to current bills, which are redeemed at the counter of the bank on presentation, and pass at par value in business transactions at the place where offered. Notes not thus current at their par value, nor redeemable on presentation, are not a good tender to principal or agent, whether they are objected to at the time or not.

In *Ontario Bank v. Lightbody*, 13 Wend. 105, it was held that the payment of a check in the bill of a bank which had previously suspended was not a satisfaction of the debt, though the suspension was unknown by either of the parties, and the bill was current at the time, the court observing that the bills of banks could only be considered and treated as money so long as they are redeemed by the bank in specie.

That the power of a collecting agent by the general law is limited to receiving for the debt of his principal that which the law declares to be a legal tender, or which is by common consent con-

sidered and treated as money, and passes as such at par, is established by all the authorities. The only condition they impose upon the principal is, that he shall inform the debtor that he refuses to sanction the unauthorized transaction of his agent within a reasonable period after it is brought to his knowledge: *Story* on Prom. Notes, §§ 115, 389; *Graydon v. Patterson*, 13 Iowa 256; *Ward v. Evans*, 2 Ld. Raym. 980; *Howard v. Chapman*, 4 Carr. & Payne 508.

The objection that the bond did not draw interest pending the civil war is not tenable. The defendant, Ward, who purchased the land, was the principal debtor, and he resided within the lines of the Union forces, and the bonds were there payable. It is not necessary to consider here whether the rule that interest is not recoverable on debts between alien enemies during war of their respective countries, is applicable to debts between citizens of states in rebellion and citizens of states adhering to the National Government in the late civil war. That rule can only apply when the money is to be paid to the belligerent directly. When an agent appointed to receive the money resides within the same jurisdiction with the debtor, the latter cannot justify his refusal to pay the demand, and, of course, the interest which it bears. It does not follow that the agent, if he receives the money, will violate the law by remitting it to his alien principal. "The rule," says Mr. Justice WASHINGTON, in *Conn v. Penn*, 1 Peters C. C. R. 496, "can never apply in cases where a creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the debt, because the payment to such creditor or his agent could in no respect be construed into a violation of the duties imposed by a state of war upon the debtor. The payment in such cases is not made to an enemy, and it is no objection that the agent may possibly remit the money to his principal. If he should do so, the offence is imputable to him, and not to the person paying him the money;" *Denniston v. Imbrie*, 4 Wash. C. C. 395. Nor can the rule apply when one of several joint debtors resides within the same country with the creditor, or with the known agent of the creditor. It was so held in *Paul v. Christie*, 4 Harris & McHenry's Rep. 161.

Here the principal debtor resided, and the agent of the creditor for the collection of the first bond was situated within the Federal lines and jurisdiction. No rule respecting intercourse with the

enemy could apply as between Marbury, the cashier of the bank at Alexandria, and Ward, the principal debtor residing at the same place.

The principal debtor being within the Union lines, could have protected himself against the running of interest on the other two bonds, by attending on their maturity at the bank, where they were made payable, with the funds necessary to pay them. If the creditor within the Confederate lines had not in that event an agent present to receive payment and surrender the bonds, he would have lost the right to claim subsequent interest.

Judgment affirmed.

*United States Circuit Court. District of Virginia.*

EX PARTE CÆSAR GRIFFIN.

Where a person was regularly indicted, convicted, and sentenced under proceedings in a court of competent jurisdiction, the fact that the judge who presided at the trial and passed sentence was within the class prohibited from holding office by the Fourteenth Amendment to the Constitution of the United States, does not make the sentence a nullity nor entitle the prisoner to a discharge on *habeas corpus*.

The third section of the fourteenth amendment did not by its own direct and immediate effect, remove from office persons lawfully appointed or elected before its passage, though they may have been ineligible to hold such office under the prohibition of the amendment. Legislation by Congress was necessary to give effect to the prohibition by providing for removal.

The exercise of their official functions by these officers until removed in pursuance of such legislation is lawful and valid.

The government of Virginia formed at Wheeling by the loyal citizens of the state after the passage of the ordinance of secession by the convention at Richmond, having been recognised by the executive and legislative departments of the national government, must be treated by the courts of the United States as the lawful government of the state.

THIS was an appeal from an order of discharge from imprisonment made by the district judge, acting as a judge of the Circuit Court, upon a writ of *habeas corpus*, allowed upon the petition of Cæsar Griffin.

*L. H. Chandler and C. S. Bundy*, for petitioner.

*Bradley T. Johnson and James Neeson*, contra.

CHASE, C. J.—The petition alleged unlawful restraint of the petitioner, in violation of the Constitution of the United States, by the sheriff of Rockbridge county, Virginia, in virtue of a pretended judg-

ment rendered in the Circuit Court of that county by Hugh W. Sheffey, present and presiding therein as judge, though disabled from holding any office whatever by the fourteenth amendment of the Constitution of the United States.

Upon this petition a writ of *habeas corpus* was allowed and served, and the body of the petitioner, with a return showing the cause of detention, was produced by the sheriff, in conformity with its command.

The general facts of the case, as shown to the district judge, may be briefly stated as follows:—

The Circuit Court of Rockbridge county is a Court of Record of the state of Virginia, having civil and criminal jurisdiction. In this court, the petitioner, Caesar Griffin, indicted in the County Court for shooting, with intent to kill, was regularly tried, in pursuance of his own election; and, having been convicted, was sentenced according to the finding of the jury, to imprisonment for two years, and was in the custody of the sheriff to be conveyed to the penitentiary, in pursuance of this sentence.

Griffin is a colored man; but there was no allegation that the trial was not fairly conducted, or that any discrimination was made against him, either in indictment, trial, or sentence, on account of color.

It was not claimed that the grand jury, by which he was indicted, or the petit jury, by which he was tried, was not, in all respects, lawful and competent. Nor was it alleged that Hugh W. Sheffey, the judge who presided at the trial, and pronounced the sentence, did not conduct the trial with fairness and uprightness.

One of the counsel for the petitioner, indeed, upon the hearing in this court, pronounced an eulogium upon his character, both as a man and as a magistrate, to deserve which might well be the honorable aspiration of any judge.

But it was alleged and was admitted that Judge Sheffey, in December 1849, as a member of the Virginia House of Delegates, took an oath to support the Constitution of the United States, and, also, that he was a member of the legislature of Virginia in 1862, during the late rebellion, and as such voted for measures to sustain the so-called Confederate States in their war against the United States; and it was claimed in behalf of the petitioner, that he thereby became, and was at the time of the trial of the petitioner, disqualified to hold any office, civil or military, under the United States, or under any state; and it was specially insisted that the petitioner was entitled to his discharge upon the ground of the incapacity of Sheffey, under the fourteenth amendment, to act as judge and pass sentence of imprisonment.

Upon this showing and argument, it was held by the district judge that the sentence of Caesar Griffin was absolutely null; that his imprisonment was in violation of the Constitution of the United States, and an order for his discharge from custody was made accordingly.

The general question to be determined on the appeal from this order is whether or not the sentence of the Circuit Court of Rockbridge county must be regarded as a nullity, because of the disability to hold any office under the state of Virginia, imposed by the fourteenth amendment, on the person who, in fact, presided as judge in that court.

It may be properly borne in mind that the disqualification did not exist at the time that Sheffey became judge.



When the functionaries of the state government, existing in Virginia at the commencement of the late civil war, took part, together with a majority of the citizens of the state, in rebellion against the government of the United States, they ceased to constitute a state government for the state of Virginia which could be recognised as such by the national government. Their example of hostility to the Union, however, was not followed throughout the state. In many counties, the local authorities and majorities of the people adhered to the national government; and representatives from these counties soon after assembled in convention at Wheeling, and organized a government for the state. This government was recognised as the lawful government of Virginia by the executive and legislative departments of the national government; and this recognition was conclusive upon the judicial department.

The government of the state thus recognised was in contemplation of law, the government of the whole state of Virginia; though excluded, as the government of the United States was itself excluded, from the greater portion of the territory of the state. It was the legislature of the reorganized state which gave the consent of Virginia to the formation of the state of West Virginia. To the formation of that state, the consent of its own legislature, and of the legislature of the state of Virginia, and of Congress, was indispensable. If either had been wanting, no state, within the limits of the old, could have been constitutionally formed: and it is clear that if the government instituted at Wheeling was not the government of the whole state of Virginia, no new state has ever been constitutionally formed within her ancient boundaries.

It cannot admit of question, then, that the government which consented to the formation of the state of West Virginia, remained in all national relations the government of Virginia, although that event reduced to very narrow limits the territory acknowledging its jurisdiction, and not controlled by insurgent force. Indeed, it is well known historically that the state and the government of Virginia, thus organized, was recognised by the national government. Senators and representatives from the state occupied seats in Congress, and when the insurgent force which held possession of the principal part of the territory, was overcome, and the government recognised by the United States was transferred from Alexandria to Richmond, it became in fact, what it was before in law, the government of the whole state. As such it was entitled, under the Constitution, to the same recognition and respect, in national relations, as the government of any other state.

It was under this government that Hugh W. Sheffey was, on the 22d February 1866, duly appointed judge of the Circuit Court of Rockbridge county, and he was in the regular exercise of his functions as such when Griffin was tried and sentenced.

More than two years had elapsed, after the date of his appointment, when the ratification of the fourteenth amendment by the requisite number of states was officially promulgated by the Secretary of State on the 28th of July 1868.

That amendment, in its third section, ordains that "no person shall be a senator or representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath as a

member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof."

And it is admitted that the office held by Judge Sheffey, at the time of the trial of Griffin, was an office under the state of Virginia, and that he was one of the persons to whom the prohibition to hold office pronounced by the amendment applied.

The question to be considered, therefore, is whether, upon a sound construction of the amendment, it must be regarded as operating directly, without any intermediate proceeding whatever, upon all persons within the category of prohibition, and as depriving them at once and absolutely of all official authority and power.

One of the counsel for the petitioner suggested that the amendment must be construed with reference to the Act of 1867, which extends the writ of *habeas corpus* to a large class of cases in which the previous legislation did not allow it to be issued. And it is proper to say a few words of this suggestion here.

The Judiciary Act of 1789 expressly denied the benefit of the writ of *habeas corpus* to prisoners not confined under or by color of the authority of the United States. Under that act, no person confined under state authority could have the benefit of the writ. Afterwards, in 1833 and 1842, the writ was extended to certain cases, specially described, of imprisonment under state process; and, in 1867, by the act to which the counsel referred, the writ was still further extended "to all cases where any person may be restrained of liberty in violation of the Constitution, or of any treaty or law of the United States."

And the learned counsel was, doubtless, correct in maintaining that without the Act of 1867 there would be no remedy by *habeas corpus* in the case of the petitioner, nor, indeed, in any case of imprisonment in violation of the Constitution of the United States, except in the possible case of an imprisonment not only within the provisions of this act, but also within the provisions of some one of the previous Acts of 1789, 1833, and 1842.

But if, in saying that the amendment must be construed with reference to the act, the counsel meant to affirm that the existence of the act throws any light whatever upon the construction of the amendment, the court is unable to perceive the force of his observation.

It is not pretended that imprisonment for shooting with intent to kill is unconstitutional, and it will hardly be affirmed that the Act of 1867 throws any light whatever upon the question whether such imprisonment in any particular case is unconstitutional. The case of unconstitutional imprisonment must be established by appropriate evidence. It cannot be inferred from the existence of a remedy for such a case. And, surely, no construction, otherwise unwarranted, can be put upon the amendment more than upon any other provision of the Constitution, to make a case of violation out of acts which, otherwise, must be regarded as not only constitutional, but right.

We come then to the question of construction. What was the intention of the people of the United States in adopting the fourteenth

amendment? What is the true scope and purpose of the prohibition to hold office contained in the third section?

The proposition maintained in behalf of the petitioner, is that this prohibition, instantly, on the day of its promulgation, vacated all offices held by persons within the category of prohibition, and made all official acts performed by them since that day null and void.

One of the counsel sought to vindicate this construction of the amendment upon the ground that the definitions of the verb "to hold," given by Webster in his dictionary, are "to stop; to confine; to restrain from escape; to keep fast; to retain;" of which definitions, the author says that "to hold rarely or never signifies the first act of seizing or falling on, but the act of retaining a thing when seized on or confined."

The other counsel seemed to be embarrassed by the difficulties of this literal construction, and sought to establish a distinction between sentences in criminal cases, and judgments and decrees in civil cases. He admitted, indeed, that the latter might be valid when made by a court held by a judge within the prohibitive category of the amendment; but insisted that the sentences of the same court in criminal cases must be treated as nullities. The ground of the distinction, if we correctly apprehend the argument, was found in the circumstance that the Act of 1867 provided a summary redress in the latter class of cases; while in the former, no summary remedy could be had, and great inconvenience would arise from regarding decrees and judgments as utterly null and without effect.

But this ground of distinction seems to the court unsubstantial. It rests upon the fallacy already commented on. The amendment makes no such distinction as is supposed. It does not deal with cases, but with persons. The prohibition is general. No person in the prohibitive category can hold office. It applies to all persons and to all offices under the United States, or any state. If upon a true construction, it operates as a removal of a judge, and avoids all sentences in criminal cases, pronounced by him after the promulgation of the amendment, it must be held to have the effect of removing all judges and all officers, and annulling all their official acts after that date.

The literal construction, therefore, is the only one upon which the order of the learned district judge, discharging the prisoner, can be sustained; and was indeed, as appears from his certificate, the construction upon which the order was made. He says expressly "the right of the petitioner to his discharge appeared to me to rest solely on the incapacity of the said Hugh W. Sheffey to act (that is, as judge), and so to sentence the prisoner, under the fourteenth amendment."

Was this a correct construction?

In the examination of questions of this sort, great attention is properly paid to the argument from inconvenience. This argument, it is true, cannot prevail over plain words or clear reason. But, on the other hand, a construction, which must necessarily occasion great public and private mischief, must never be preferred to a construction which will occasion neither, or neither in so great degree, unless the terms of the instrument absolutely require such preference.

Let it then be considered what consequences would spring from the literal interpretation contended for in behalf of the petitioner.

The amendment applies to all the states of the Union, to all offices

under the United States or under any state, and to all persons in the category of prohibition, and for all time present and future. The offences, for which exclusion from office is denounced, are not merely engaging in insurrection or rebellion against the United States, but the giving of aid or comfort to their enemies. They are offences not only of civil, but of foreign, war.

Now, let it be supposed that some of the persons, described in the third section, during the war with Mexico, gave aid and comfort to the enemies of their country, and, nevertheless, held some office on the 28th of July 1868, or subsequently.

Is it a reasonable construction of the amendment which will make it annul every official act of such an officer?

But, let another view be taken. It is well known that many persons, engaged in the late rebellion, have emigrated to states which adhered to the national government, and it is not to be doubted that not a few among them, as members of Congress, or officers of the United States, or as members of state legislatures, or as executive or judicial officers of a state, had before the war taken an oath to support the Constitution of the United States. In their new homes, capacity, integrity, fitness, and acceptability, may very possibly have been more looked to than antecedents. Probably some of these persons have been elected to office in the states which have received them. It is not unlikely that some of them held office on the 28th July 1868. Must all their official acts be held to be null under the inexorable exigencies of the amendment?

But the principal intent of the amendment was, doubtless, to provide for the exclusion from office, in the lately insurgent states, of all persons within the prohibitive description.

Now, it is well known that before the amendment was proposed by Congress, governments acknowledging the constitutional supremacy of the national government had been organized in all these states. In some these governments had been organized through the direct action of the people, encouraged and supported by the President, as in Tennessee, Louisiana, and Arkansas, and in some through similar action in pursuance of executive proclamations, as in North Carolina, Alabama, and several other states. In Virginia such a state government had been organized as has been already stated, soon after the commencement of the war; and this government had been fully recognised by Congress, as well as by the President.

This government, indeed, and all the others, except that of Tennessee, were declared by Congress to be provisional only.

But, in all these states all offices had been filled, before the ratification of the amendment, by citizens, who, at the time of the ratification, were actively engaged in the performance of their several duties. Very many, if not a majority of these officers, had, in one or another of the capacities described in the third section, taken an oath to support the Constitution, and had afterwards engaged in the late rebellion; and most if not all of them continued in the discharge of their functions after the promulgation of the amendment, not supposing that by its operation their offices could be vacated without some action of Congress.

If the construction now contended for be given to the prohibitive section, the effect must be to annul all official acts performed by these officers. No sentence, no judgment, no decree, no acknowledgment of a

deed, no record of a deed, no sheriff's or commissioner's sale—in short, no official act—is of the least validity. It is impossible to measure the evils which such a construction would add to the calamities which have already fallen upon the people of these states.

The argument from inconveniences, great as these, against the construction contended for, is certainly one of no light weight.

But there is another principle, which, in determining the construction of this amendment, is entitled to equal consideration with that which has just been stated and illustrated. It may be stated thus: Of two constructions, either of which is warranted by the words of an amendment of a public act, that is to be preferred which best harmonizes the amendment with the general tenor and spirit of the act amended.

This principle forbids a construction of the amendment, not clearly required by its terms, which will bring it into conflict or discord with the other provisions of the Constitution.

And here it becomes proper to examine somewhat more particularly the character of the third section of the amendment.

The amendment itself was the first of the series of measures proposed or adopted by Congress with a view to the reorganization of state governments acknowledging the constitutional supremacy of the national government, in those states which had attempted to break up their constitutional relations with the Union, and to establish an independent confederacy.

✓ All citizens who had, during its earlier stages, engaged in or aided the war against the United States, which resulted inevitably from this attempt, had incurred the penalties of treason under the statute of 1790.

But, by the Act of July 17th 1862, while the civil war was flagrant, the death penalty for treason, committed by engaging in rebellion, was practically abolished. Afterwards, in December 1863, full amnesty, on conditions which now certainly seem to be moderate, was offered by President Lincoln in accordance with the same Act of Congress; and after organized resistance to the United States had ceased, amnesty was again offered, in accordance with the same act, by President Johnson, in May 1865. In both these offers of amnesty extensive exceptions were made.

In June 1866, little more than a year later, the fourteenth amendment was proposed; and was ratified in July 1868. The only punitive section contained in it is the third, now under consideration. It is not improbable that one of the objects of this section was to provide for the security of the nation and of individuals by the exclusion of a class of citizens from office; but it can hardly be doubted that its main purpose was to inflict upon the leading and most influential characters who had been engaged in the rebellion, exclusion from office as a punishment for the offence.

It is true that, in the judgment of some enlightened jurists, its legal effect was to remit all other punishment. And such certainly was its practical effect, for it led to the general amnesty of December 25th, of the same year, and to the order discontinuing all prosecutions for crime, and proceedings for confiscation originating in the rebellion. But this very effect shows distinctly its punitive character.

Now it is undoubted that those provisions of the Constitution which deny to the legislature power to deprive any person of life, liberty, or property without due process of law, or to pass a bill of attainder or an *ex post facto* law, are inconsistent in their spirit and general purpose with a provision which, at once, without trial, deprives a whole class of persons of offices held by them, for any cause, however grave. It is true that no limit can be imposed on the people when exercising their sovereign power in amending their own constitution of government. But it is a necessary presumption that the people, in the exercise of that power, seek to confirm and improve rather than to weaken and impair the general spirit of the Constitution.

If there were no other grounds than these for seeking another interpretation of the amendment than that which we are asked to put upon it, this court would feel itself bound to hold them sufficient.

But there is another and sufficient ground, and it is this, that the construction demanded in behalf of the petitioner is nugatory except for mischief.

In the language of one of the counsel, "the object had in view by us is not to unseat Hugh W. Sheffey, and no judgment of the court can effect that."

Now the object of the amendment is to unseat every officer, whether judicial or executive, who holds civil or military office in contravention of the terms of the amendment. Surely, a construction which fails to accomplish the main purpose of the amendment and yet necessarily works the mischiefs and inconveniences which have been described, and is repugnant to the first principles of justice and right embodied in other provisions of the Constitution, is not to be favored, if any other reasonable construction can be found.

Is there, then, any other reasonable construction? In the judgment of the court there is another, not only reasonable, but very clearly warranted by the terms of the amendment, and recognised by the legislation of Congress.

The object of the amendment is to exclude from certain offices a certain class of persons. Now, it is obviously impossible to do this by a simple declaration, whether in the Constitution or in an Act of Congress, that all persons included within a particular description shall not hold office. For, in the very nature of things, it must be ascertained what particular individuals are embraced by the definition before any sentence of exclusion can be made to operate. To accomplish this ascertainment and insure effective results, proceedings, evidence, decisions, and enforcement of decisions, more or less formal, are indispensable; and these can only be provided for by Congress.

Now, the necessity of this is recognised by the amendment itself, in its fifth and final section, which declares that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

There are, indeed, other sections than the third, to the enforcement of which legislation is necessary; but there is no one which more clearly requires legislation in order to give effect to it. The fifth section qualifies the third to the same extent as it would if the whole amendment consisted of these two sections.

And the final clause of the third section itself is significant. It gives to Congress absolute control of the whole operation of the amendment.

These are its words: "But Congress may, by a vote of two-thirds of each house, remove such disability." Taking the third section then in its completeness, with this final clause, it seems to put beyond reasonable question the conclusion that the intention of the people of the United States, in adopting the fourteenth amendment, was to create a disability, to be removed in proper cases by a two-thirds vote, and to be made operative in other cases by the legislation of Congress in its ordinary course. This construction gives certain effect to the undoubted intent of the amendment to insure the exclusion from office of the designated class of persons, if not relieved from their disabilities, and avoids the manifold evils which must attend the construction insisted upon by the counsel for the petitioner.

It results from this examination that persons in office by lawful appointment, or election, before the promulgation of the fourteenth amendment, are not removed therefrom by the direct and immediate effect of the prohibition to hold office contained in the third section; but that legislation by Congress is necessary to give effect to the prohibition, by providing for such removal. And it results further that the exercise of their several functions by these officers, until removed in pursuance of such legislation, is not unlawful.

The views which have been just stated receive strong confirmation from the action of Congress and of the executive department of the government. The decision of the district judge, now under revision, was made in December 1868, and two months afterwards, in February 1869, Congress adopted a joint resolution entitled "A resolution respecting the provisional governments of Virginia and Texas." In this resolution it was provided that persons "holding office in the provisional governments of Virginia and Texas," but unable to take and subscribe the test oath prescribed by the Act of July 2d 1862, except those relieved from disability, "be removed therefrom;" but a provision was added, suspending the operation of the resolution for thirty days from its passage. The joint resolution was passed and received by the President on the 6th of February, and not having been returned in ten days, became a law without his approval.

It cannot be doubted that this joint resolution recognised persons unable to take the oath required, to which class belonged all persons within the description of the third section of the fourteenth amendment, as holding office in Virginia at the date of its passage, and provided for their removal from office.

It is not clear whether it was the intent of Congress that this removal should be effected in Virginia by the force of the joint resolution itself, or by the commander of the first military district. It was understood by the executive or military authorities as directing the removal of the persons described, by military order. The resolution was published by command of the general of the army for the information of all concerned, on the 22d of March 1869. It had been previously published by direction of the commander of the first military district, accompanied by an order, to take effect on 18th of March 1869, removing the persons described from office. The date at which this order was to take effect was afterwards changed to the 21st of March.

It is plain enough from this statement that persons holding office in Virginia, and within the prohibition of the fourteenth amendment, were

not regarded by Congress, or by the military authority, in March 1869, as having been already removed from office.

It is unnecessary to discuss here the question whether the government of Virginia, which seems to have been not provisional, but permanent, when transferred from Alexandria to Richmond, became provisional under the subsequent legislation of Congress, or to express any opinion concerning the validity of the joint resolution, or of the proceedings under it. The resolution and proceedings are referred to here only for the purpose of showing that the amendment had not been regarded by Congress or the executive, so far as represented by the military authorities, as effecting an immediate removal of the officers described in the third section.

After the most careful consideration, therefore, I find myself constrained to the conclusion that Hugh W. Sheffey had not been removed from the office of judge at the time of the trial and sentence of the petitioner; and that the sentence of the Circuit Court of Rockbridge county was lawful.

In this view of the case, it becomes unnecessary to determine the question relating to the effect of the sentence of a judge *de facto* exercising the office with the color, but without the substance, of right. It is proper to say, however, that I should have no difficulty in sustaining the custody of the sheriff, under the sentence of a court held by such a judge.

Instructive argument and illustration of this branch of the case might be derived from an examination of those provisions of the Constitution ordaining that no person shall be a Representative, or Senator, or President, or Vice-President, unless having certain prescribed qualifications. These provisions, as well as those which ordain that no senator or representative shall, during his term of service, be appointed to any office under the United States, under certain circumstances, and that no person holding any such office shall, while holding such office, be a member of either house, operate on the capacity to take office. The election or appointment itself is prohibited and invalidated; and yet no instance is believed to exist where a person has been actually elected, and has actually taken the office, notwithstanding the prohibition, and his acts, while exercising its functions, have been held invalid.

But it is unnecessary to pursue the examination. The cases cited by counsel cover the whole ground, both of principle and authority.<sup>1</sup>

This subject received the consideration of the judges of the Supreme Court at the last term with reference to this and kindred cases in this district, and I am authorized to say that they unanimously concur in the opinion that a person convicted by a jury, and sentenced in a court held by a judge *de facto*, acting under color of office, though not *de jure*, and detained in custody in pursuance of his sentence, cannot be properly discharged upon *habeas corpus*.

It follows that the order of the district judge must be reversed, and that the petitioner must be remanded to the custody of the sheriff of Rockbridge county.

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<sup>1</sup> *Taylor v. Skinner*, 2 So. Ca. 696; *State v. Bloom*, 17 Wis. 521; *Ex rel Ballou v. Bangs*, 24 Ill. 184.



*Supreme Court of Pennsylvania.*THE PITTSBURGH COAL COMPANY v. ALEXANDER W. FOSTER,  
ET AL.

The damages ordinarily recoverable for breach of contract are those necessarily following the breach which the derelict party must be presumed to know would be the probable consequence of his failure.

The failure of an engine builder to furnish at a fixed time, according to contract, to a coal company a suitable engine for transporting their coal, entitles them to damages for their expenses in such transportation, with the means they had, or the best they could procure during the period of delay, beyond what they would have incurred with the engine.

But they cannot claim also for the profits in the transportation by engine of the extra quantity of coal they might have transported by it in the same period—it not being fairly inferable that the builder would know that its possession would enable them to mine more coal, and also to haul more.

An interested witness cannot be offered to purge himself of his interest by his own *voirs dire*.

Corporation books do not prove themselves: proof of their true character must be given to authorize their reception in evidence.

At the time of offering evidence some competent purpose should be stated as the ground for its reception, if it be not obviously competent on its face.

ERROR to the District Court of *Allegheny county*.

*J. H. Bailey*, for plaintiffs in error.

*C. B. Smith*, contra.

The opinion of the court was delivered by

AGNEW, J.—The only question we need discuss in this case is that relating to the measure of damages. The defendants below offered in substance to prove the difference in the expense of transporting the coal carried on their railroad, between horse or mule power and steam-power, and for this purpose to prove how much coal was actually carried over their railroad between the 1st day of February—the time for the delivery of the engine under the contract—and the day when the engine was actually put in running order on the road; claiming that this difference of expense was a loss directly occasioned by the failure to finish and deliver the engine in time.

The learned judge overruled this offer, being of opinion that the measure of damages for the delay was the ordinary hire of a locomotive during the period of the delay. We think that under the circumstances of the case, this was an error. It was in proof, and was also a part of the offer, that the only means the defendants had of transporting their coal was by horses and mules, and it also appeared in the evidence that owing to the gauge of the railroad track and the kind of engine required for their use, it was impossible to have procured for hire an engine to suit their purpose, and that the hire of such an engine was purely a

speculative, and not a practical question, owing to the fact that the witnesses knew of none such to be had.

The true inquiry which arose under these circumstances, was whether the damages thus claimed were the necessary consequence of the failure to perform the contract in time, and whether they were presumptively within the view of the plaintiffs at the time of making their contract to finish and deliver the engine in running order on the defendants' track by the 1st of February. The damages ordinarily recoverable are those necessarily following the breach, which the party guilty of the breach must be presumed to know would be the probable consequence of his failure: 2 Greenl. Ev. § 253. This rule is well expressed by STRONG, J., in *Adams Express Co. v. Egbert*, 12 Casey 364. They must be a proximate consequence of the breach, not merely remote or possible. There is no measure for losses of the latter kind. "But on the other hand," he remarks, "the loss of profits or advantages, which must have resulted from a fulfilment of the contract, may be compensated in damages, when they are the direct and immediate fruits of the contract, and must therefore have been stipulated for, and have been in the contemplation of the parties when it was made."

This statement of the rule is quoted with approbation by THOMPSON, J., in *Fassler v. Love*, 12 Wright 410-11. The subject is also discussed at large by myself in *Fleming v. Beck*, Id. 312-13, and the same rule in substance quoted from *Hadley v. Baxendale*, 9 Exch. 341 (Wels. Hurlst. & Gordon).

That the loss in this case was immediate, and the necessary consequence of non-fulfilment, is obvious. The coal company was by the contract to have a finished locomotive adapted to their railroad put in thorough running order upon their track by the 1st day of February. The direct consequence of not getting it was, that they were obliged to continue transporting their coal as before, by horses and mules, until the engine was put there. It is quite as clear also, that this consequence must have been in full view of Foster & Co. when they entered into the contract. The instrument evidencing the agreement was a proposition of Foster & Co. accepted by the president of the coal company.

It was directed to James M. Bailey, President of the Pittsburgh Coal Company, and proposed to build a locomotive engine to fit a forty inch track. It was to be built in a workmanlike manner, of the best material, and finished by the 1st day of February then next, and "put in thorough running order on your track on or before that day."

The price, \$5500, was to be paid to wit: \$1500 on the 16th day of January, "and the balance when the engine is completed and running on your road." Thus the proposition to build the engine shows very clearly that Foster & Co. knew that it was to be used in running on a coal railroad, and upon a track of unusual gauge, and the proof shows that at the time of the making of the contract, engines of the size and character of the one described in the proposition, were not in ordinary use and could not be hired. From the nature of the circumstances Foster & Co., as engine builders, must have known that if they failed to deliver the engine on the track by the day agreed upon, the coal company would be forced to continue transporting their coal by their former means, and consequently would suffer a loss in the difference of expense

of transportation between the old mode and the one stipulated for in the contract.

To this extent, therefore, we think the court below erred in rejecting the testimony. But the superadded offer, when the proposition was renewed, to prove that the defendants could have mined and hauled one-third more coal with the engine than by the old mode, and to show the profits arising thence, was rightly rejected by the court.

While it is obvious that Foster & Co. must have known that their failure would compel the company to continue in the use of their old mode of transportation, it cannot be fairly inferred that they would know that the possession of the engine would enable the company to mine more coal, and also to haul more. This is a possible or remote consequence, but not a necessary one. For aught Foster & Co. could know the defendants were mining to the extent of their ability to operate in the mines; and even could they mine more, it does not follow they must know that the engine would haul more in the same time than the company could do with their horses and mules. The principles governing this offer are stated pretty fully in *Fleming v. Beck*, 12 Wright 312-13.

The reversal of the judgment renders the rejection of James M. Bailey as a witness unimportant, for on the next trial the charter can be given in evidence showing that the president of the company must be a stockholder, and if he be offered it must be shown that he has since transferred his stock.

Presuming Bailey to have been interested, it was clearly right to reject his oath as the means of divesting himself of his interest. An interested witness cannot be offered to purge himself of his interest by his own *voire dire*. The refusal to receive the transfer book without evidence of its true character being given, was also right. Corporation books do not prove themselves.

The rejection of Geissip's deposition was also right. At the time of offering it no competent purpose was stated as the ground for its reception, and so far as the court could discover upon its face, it did not seem to be relevant to any such purpose. It is the duty of a party to state the purpose of his offer, if the evidence is not obviously competent on its face. A court is not bound to search for some distant relevancy that may exist, but which cannot readily be discerned without the attention of the court being directed to it.

But for the error as to the true measure of the damages the judgment must be reversed.

Judgment reversed, and a *venire facias de novo* awarded.

## LEGAL NOTES.

**UNITED STATES JUDICIAL SYSTEM—RECENT CHANGE.** By an act passed at the recent session of Congress the Supreme Court is to consist hereafter of nine judges, six of whom shall be a quorum. The act also provides for the appointment of a circuit judge in each circuit, with the same powers as the judges of the Supreme Court now have on circuit. The Circuit Court is to be held by the judge of the Supreme Court assigned to the circuit, or the circuit judge, or the judge of the District Court, or by any two of them sitting together. We do not perceive that the jurisdiction of the Circuit Court is in anywise affected, the sole purpose of this part of the act being apparently to relieve the judges of the Supreme Court from the pressure of their present circuit duty.

But the feature of the act which attracts special attention is a clause providing that "any judge of any court of the United States who shall, after having attained the age of seventy years, and served for the term of ten years, resign his office, shall thereafter during the rest of his natural life, receive the same salary which was by law payable to him at the time of his resignation." This we believe is the first provision ever made in the United States for a retiring pension for those who have devoted themselves to the public service. Regarding it as we do, as a decided step forward in civilization and good government, we trust that it may be a permanent portion of our judicial system.

**MEMBER OF CONGRESS—PRIVILEGE FROM ARREST.** *Kimberly v. Benjamin F. Butler* was an action of *assumpsit* for money which plaintiff alleged defendant had illegally compelled him to pay as rent, while defendant was in command at Fortress Monroe during the war. The action was brought originally in the Superior Court of Baltimore, but removed into the United States Circuit Court, where defendant pleaded his privilege as a member of Congress in abatement of the action, to which plea plaintiff demurred. The question was similar to that raised in *Wooley v. Butler*, *anté*, p. 53, and was argued by *R. J. Brent* and *W. M. Addison, Esqs.*, for plaintiff, and *Hon. Caleb Cushing* for General Butler. CHASE, C. J., held that the privilege of exemption from arrest means from arrest with a view to imprisonment, and does not extend to exemption from service of summons or other process not involving detention of the person of defendant. This agrees with the decision of DOBBIN, J., in *Wooley v. Butler*, *anté*, p. 53.

**STATE GOVERNMENTS—REORGANIZATION AFTER THE REBELLION—ALIENATION OF STATE PROPERTY DURING THE WAR.** *The State of Texas v. White et al.*, in the Supreme Court of the United States, was an original suit, in which the state of Texas, claiming certain bonds of the United States as her property, asks an injunction to restrain the defendants from receiving payment from the national government, and to compel the surrender of the bonds to the state.

The United States, by Act of September 9th 1850, offered to the state of Texas, in compensation for her claims connected with the settlement of her boundary, \$10,000,000 in five per cent. bonds, which offer was accepted by Texas.

One-half of these bonds were retained for certain purposes in the national treasury, and the other half were delivered to the state.

The bonds thus delivered were dated January 1st 1851, and were all made payable to the state of Texas, or bearer, and redeemable after the 31st day of December 1864.

They were received, in behalf of the state, by the comptroller of public accounts, under authority of an act of the legislature which, besides giving that authority, provided that no bond should be available in the hands of any holder until after endorsement by the governor of the state.

After the breaking out of the rebellion, the insurgent legislature of Texas, on the 11th of January 1862, repealed the act requiring the endorsement of the governor,<sup>1</sup> and, on the same day, provided for the organization of a military board, composed of the governor, comptroller, and treasurer, and authorized a majority of that board to provide for the defence of the state by means of any bonds in the treasury, upon any account, to the extent of \$1,000,000.<sup>2</sup>

The defence contemplated by the act was to be made against the United States by war.

Under this authority the military board entered into an agreement with George W. White and John Chiles, two of the defendants, for the sale to them of one hundred and thirty-five of these bonds, then in the treasury of the state, and seventy-six more, then deposited with Droege & Co., in England, in payment for which they engaged to deliver to the board a large quantity of cotton cards and medicines. This agreement was made on the 12th of January 1862.

On the 12th of March 1862, White and Chiles received from the military board 135 of these bonds, none of which were endorsed by any governor of Texas.

Afterward, in the course of the years 1865 and 1866, some of the same bonds came into the possession of others of the defendants by purchase, or as security for advances of money.

Chief Justice CHASE, on April 12th, delivered the opinion of the court, holding the following points:—

1. The word state describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country, or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government.

2. In the Constitution the term state most frequently expresses the combined idea just noticed of people, territory, and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed.

3. But the term is also used to express the idea of a people or political community as distinguished from the government. In this sense it is used in the clause which provides that the United States shall guarantee to every state in the Union a republican form of government, and shall protect each of them against invasion.

<sup>1</sup> Acts of Texas, 1862, p. 45.

<sup>2</sup> Texas Laws, 1862, p. 55.

4. The Union of the states never was a purely artificial and arbitrary relation. It began among the colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction, from the Articles of Confederation. By these the Union was solemnly declared to "be perpetual." And, when these articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union."

5. But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government, by the states. On the contrary, it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution, as the preservation of the Union and the maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states.

6. When Texas became one of the United States she entered into an indissoluble relation. The union between Texas and the other states was as complete, as perpetual, and as indissoluble, as the union between the original states. There was no place for reconsideration, or revocation, except through revolution, or through consent of the states.

7. Considered as transactions under the Constitution, the ordinance of secession adopted by the convention, and ratified by a majority of the citizens of Texas, and all the acts of her legislature, intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The state did not cease to be a state, nor her citizens to be citizens of the Union.

8. But, in order to the exercise, by a state, of the right to sue in this court, there needs to be a state government, competent to represent the state, in its relations with the national government, so far, at least, as the institution and prosecution of a suit is concerned.

9. While Texas was controlled by a government hostile to the United States, and, in affiliation with a hostile confederation, waging war upon the United States, no suit instituted in her name could be maintained in this court. It was necessary that the government and the people of the state should be restored to peaceful relations to the United States, under the Constitution, before such a suit could be prosecuted.

10. Authority to suppress rebellion is found in the power to suppress insurrection and carry on war; and authority to provide for the restoration of state governments, under the Constitution, when subverted and overthrown, is derived from the obligation of the United States to guarantee to every state in the Union a republican form of government. The latter, indeed, in the case of a rebellion, which involves the government of a state, and, for the time, excludes the national authority from its limits, seems to be a necessary complement to the other.

11. When slavery was abolished the new freemen necessarily became part of the people; and the people still constituted the state: for states, like individuals, retain their identity, though changed, to some extent, in their constituent elements. And it was the state, thus constituted, which was now entitled to the benefit of the constitutional guaranty.

12. In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the state to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.

13. So long as the war continued, it cannot be denied that the President might institute temporary government within insurgent districts, occupied by the national forces, or take provisional measures, in any state, for the restoration of state government faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by constitutional laws. But the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress, though necessarily limited to cases where the rightful government is subverted by revolutionary violence, or in imminent danger of being overthrown by an opposing government, set up by force within the state.

14. The several executives of Texas, partially at least, reorganized under the authority of the President and of Congress, having sanctioned this suit, the necessary conclusion is, that it was instituted and is prosecuted by competent authority.

15. Public property of a state, alienated during rebellion by an usurping state government for the purpose of carrying on war against the United States, may be reclaimed by a restored state government, organized in allegiance to the Union, for the benefit of the state.

16. Exact definitions, within which the acts of a state government, organized in hostility to the Constitution and government of the United States, must be treated as valid or invalid, need not be attempted. It may be said, however, that acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void.

17. Purchasers of United States bonds issued payable to the state of Texas or bearer, alienated during rebellion by the insurgent government, and acquired after the date at which the bonds became redeemable, are affected with notice of defect of title in the seller.

SIR JAMES PLAISTED WILDE, the Judge of Probate of England, and Judge Ordinary of the Court of Divorce and Matrimonial Causes, has been raised to the peerage, and will be known hereafter as Lord PENZANCE.

AMERICAN HEIRS TO ENGLISH ESTATES.—HON. J. P. BENJAMIN, formerly a senator from Louisiana, then Attorney-General and Secretary of State of the Confederate States, is now practising law in London,

whence he has lately written a letter exposing the humbug of getting up claims in America, of heirship to immense English estates, which either have no existence whatever, or certainly are not in abeyance waiting for some unknown American heir to come and take them.

We do not suppose that any reputable American lawyer is likely to be misled, or to mislead his clients on this subject, but as there seems to be a considerable popular delusion about it, we are glad to see the matter quieted by a word from so good a lawyer as Mr. Benjamin.

**MEDICAL PRACTITIONERS—LEGISLATION AGAINST QUACKS.** We learn from the *Medical Record* of New York, that the state of Minnesota has passed an act (March 4th 1869) providing that no person who has not attended at least two full courses of medical instruction and graduated at some school of medicine, or who cannot produce a certificate of qualification from some state or county medical society, shall practise medicine in any of its departments, or perform any surgical operation for compensation within the state, and providing a fine of not less than fifty or more than one hundred dollars for the first violation of the act, and thirty days' imprisonment for the second. The act also provides that every practitioner shall, before October 1869, file in the office of the court of the county in which he resides a sworn copy of his diploma or certificate aforesaid, and the omission to do so, shall be *prima facie* evidence that he has not graduated, &c., as required by the act. The act does not, however, apply to persons practising dentistry exclusively.

**ATTORNEY DISBARRED.** *Francis N. Fitch*, an attorney, has been struck off the rolls by the Supreme Court of New York, in the fifth judicial district, at Syracuse, January Term 1869, for fraud and misconduct as an attorney.

**AGENT—TAKING OF PROFITS ON PRINCIPAL'S MONEY—CUSTOM NOT VALID AGAINST RULES OF LAW.** *Minnesota Central Railway Company v. Morgan*, in the Supreme Court of New York, December Term 1868. Defendants, who were brokers in the city of New York, issued to plaintiff letters of credit on London, to enable plaintiff to purchase iron. As security, defendants received \$15,000 in money and a lien on all iron to be imported, and "on all policies of insurance on such goods to an amount sufficient to cover the advancements or engagements" of defendants. Defendants suggested insurance of the iron and were directed by plaintiff to make insurance, which they did by an open policy in their own name for account of whom it might concern in the Atlantic Mutual Ins. Co., giving their note for the amount of the premium.

Defendants then submitted a statement of the cost of insurance, and were directed by plaintiff to deduct it from the \$15,000 already deposited, and shortly afterwards the parties closed their accounts. Subsequently the insurance company declared a scrip dividend to policy holders for that year, amounting in this case to \$2800, which the company paid defendants. This was an action by plaintiff for an account and transfer of the scrip. Defendants claimed to hold the scrip for their own use, because the policy was issued in their name, and they gave the premium note, but principally on the ground of the custom of



agents insuring for others, sanctioned as it was claimed by the New York Chamber of Commerce, that all dividends should belong to the agent in lieu of other compensation. The court, per MULLEN, J., held that the custom was not satisfactorily proved, but, whether it was or not, no custom could avail against the positive rule of law, that an agent cannot appropriate to his own use any portion of the profits arising from the business of the agency.

**REVENUE LAW—LANDING OF GOODS WITHOUT PERMIT.** *United States v. Twenty Cases of Matches*, in the United States District Court for Wisconsin, was an information under section 50 of the Act of March 2d 1799, 1 Stat. 665, on a seizure of matches at Milwaukee for being unladen at that port from a vessel from Canada, without a permit. Claimants alleged that the matches were manufactured at Portland, Maine, and shipped in close packages via the Grand Trunk Railway, a corporation of Canada, to Chicago, that they were not intended to be opened between Portland and Chicago, and that the unloading of them at Milwaukee was without claimant's knowledge or consent. The Act of March 2d 1861, § 68, 12 Stat. 197, exempts from duty goods manufactured in the United States, exported to a foreign country, and brought back in the same condition as when exported. MILLER, D. J., held that the goods were subject to forfeiture. "The regulations of the treasury department relate to the transportation of goods while in their transit through the foreign country. These regulations may have been strictly complied with, but they have no relation to the duty imposed on the vessel to procure a permit for unloading the matches at the port of Milwaukee.

"The law under which this information is brought, prohibits the unloading or delivery of goods, wares, or merchandise brought from any foreign port or place, whether they be dutiable or not, without the permit of the collector. Nor is it any excuse or defence, that the master of the vessel put the goods ashore without the knowledge or consent of the owner or consignee. The revenue laws leave all errors or mistakes of shippers and carriers to be settled among the parties interested."

**CRIMINAL LAW—PUNISHMENT AFTER REPEAL OF STATUTE CREATING THE OFFENCE—INTERNAL REVENUE.** In *United States v. Finlay*, in the District Court of the United States, Western District of Pennsylvania, defendant was indicted under the Acts of June 30th 1864, sects. 15, 42, and 82, and March 2d 1867, sects. 94 (2 Brightly's Dig. title *Internal Revenue*, pl. 27, 48, 140), for making false returns of woollen manufactures with intent to violate the Internal Revenue Laws.

The tax on woollen goods was repealed by the Act of March 31st 1868. On motion, McCANDLESS, D. J., quashed the indictment, holding that after a repeal of the law creating an offence, there is no jurisdiction to punish a violation of the act during its existence: *Comm. v. Duane*, 1 Bin. 601.

**COLLECTOR OF INTERNAL REVENUE—LIABILITY ON HIS BOND.** *The United States v. Thorn et al.*, in the United States District Court of New Jersey, February 1869, was an action on the official bond of a collector of internal revenue. The declaration averred that defendant had violated the first condition of the bond, that he shall "faithfully

discharge the duties of his office," by granting permits for the removal of distilled spirits from bonded warehouses in his district to bonded warehouses in another district, without exacting transportation bonds with sufficient sureties, in double the amount of taxes imposed on the spirits, as required by the Act of June 30th 1864, sect. 61, and the regulations of the treasury department. The evidence was that permits had been given for the removal of nearly one thousand barrels of whiskey, and on suing out the bond the sureties could not be found. No residence was attached to their names on the bond, and in some cases only the initials of their first names were given. The defence was that defendant had relied on a clerk, and therefore could not be held on the ground of negligence, and there was no evidence of corruption or any dishonest purpose. The evidence, however, failed to show that the clerk had been intrusted with the duty of examining the sufficiency of the sureties, and in some instances the permits had been issued before the bonds were handed to him. Under the charge of FIELD, J., the jury found a verdict for the United States for \$100,000, the full amount of the defendant's bond.

J. T. M.

## ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MISSOURI.<sup>1</sup>SUPREME COURT OF NEW YORK.<sup>2</sup>

## ACCORD AND SATISFACTION.

Factors, who had agreed to insure property consigned to them, effected insurance to the amount of 41 per cent. only, and the property being destroyed by fire, they wrote to the consignors conceding their liability to account for all they had received from the insurers, and placed the amount to the credit of the consignors, hoping it would prove satisfactory. The consignors replied: "We supposed you were nearly insured in full; but if this is all we are entitled to, we must submit." And they drew a draft upon the factors for the amount received by them on account of insurance, which was paid: *Held* that, there being no dispute between the parties about the facts, or about the claim, this did not amount to an accord and satisfaction: *Beardsley et al. v. Davis*, 52 Barb.

## AGREEMENT.

*Acceptance of Proposition.*—To constitute an agreement, it is not necessary that a proposition made by one party to another by letter, should be accepted expressly. If it is acted upon, and complied with, that is a sufficient acceptance: *Beardsley et al. v. Davis*, 52 Barb.

Thus, where the defendants, factors and produce commission mer-

<sup>1</sup> From T. A. Post, Esq., Reporter; to appear in 43 Mo. Reports.

<sup>2</sup> From Hon. O. L. Barbour; to appear in vol. 52 of his Reports.

chants, addressed a letter to the plaintiffs, who were maltsters, soliciting their business, or a continuance thereof, stating their terms and inviting consignments of malt, and the plaintiffs, without replying to the letter, or expressly accepting the proposition made therein, made several shipments of malt to the defendants: *Held*, that this was an acceptance of the terms proposed; and that it was not material that the plaintiffs had previously done business with the defendants without any knowledge of their terms: *Id.*

*Held*, also, that on receiving such letter from the defendants, stating that their charges for selling were 5 per cent., which covered all expenses—insurance, storage, &c., and a guaranty of the sales the plaintiffs were at liberty to withdraw their business, or continue it as they pleased; and that the making of further shipments by them, after that, was evidence that the terms were satisfactory, and that they were accepted: *Id.*

*Held*, further, that these facts justified a finding by the referee, that there was an agreement between the parties that the defendants should cause the property of the plaintiffs to be insured: *Id.*

*To Insure; Construction of.*—When an agreement to insure is general, and there is no difficulty in procuring full insurance, and such is the general practice in the particular matter embraced in the contract, the fair and reasonable construction of the agreement is that the party undertook to procure a contract for a full indemnity: *Id.*

In the absence of any evidence, aside from the general agreement to insure, the court, in fixing the amount of the insurance, would not, it seems, stop short of a full insurance; unless it was shown that in the particular matter or business it is not the practice to fully insure: *Id.*

*Validity.*—A simple request, from one person to another, to do an act from which the former can derive no sort of benefit, made under an entire misapprehension of his rights, does not constitute a lawful contract which is obligatory upon him: *Wells v. Mann*, 52 Barb.

*Void within the Statute of Frauds.*—Where the defence of a suit brought against A. upon a promissory note, is of no benefit to B., he not being liable therein, a request from B. to A. to go on and defend the suit, if it can be considered a contract, is an independent promise on the part of B. to answer for the debt of another, which he is not otherwise liable to pay; and if not in writing, is void within the Statute of Frauds: *Id.*

#### ASSIGNMENT FOR CREDITORS.

*Attaching Creditor excluded.*—A creditor who attaches and sells the goods of his debtor, after they have been assigned under the statute for the benefit of all the creditors, will not be allowed to prove up his claim before the assignee, nor to avail himself of any of the benefits of the assignment: *Valentine v. Decker*, 43 Mo.

#### ATTACHMENT.

*Garnishee.*—If it appears that the contract of a garnishee is to pay in property, a judgment cannot be rendered against him as being indebted to the defendant, unless there has been a demand and failure to pay according to the contract: *Weil v. Tyler*, 43 Mo.

*Where set aside as irregular, no Protection.*—After an attachment, under which goods have been seized, has been set aside as irregular, it affords no shield or protection to the plaintiffs, for such taking. The moment it is set aside, they stand as though no process had ever been issued, and become trespassers *ab initio*: *Lyon v. Yates et al.*, 52 Barb.

Having taken the property as trespassers, they cannot, in an action against them for the tort, show that they subsequently caused it to be levied upon by virtue of a valid execution in their favor: *Id.*

#### BANKS.

*Subscription for Stock.*—Where, upon the organization of a bank, individuals make and sign a certificate, stating that they have associated themselves under and pursuant to the Act of 1838, to authorize the business of banking, &c., which certificate contains the name of the bank, &c., and is, in other respects, according to the requirements of the statute, and declares that the subscribers have respectively subscribed and set their hands and seals, &c., and the number of shares taken and held by each, and such numbers are affixed to the several signatures; this, without any other subscription, is sufficient to render the subscribers stockholders, and severally liable to the bank to take and pay for the number of shares set opposite each signature: *Cole, Receiver, &c. v. Ryan*, 52 Barb.

*Action by Receiver of Bank, to recover Subscription.*—Where one who has agreed to take stock, but has not paid for it, transfers the same in good faith and without fraud, to an apparently responsible person, and no debts of the bank existing at the time of such transfer, are outstanding at the time a receiver of the bank is appointed, such receiver is bound by the acts of the bank in recognising the transferee as the owner of the stock and the debtor thereon; and cannot maintain an action against the transferor to recover the amount of his subscription for the stock: *Id.*

#### CRIMINAL LAW.

*Gambling—Evidence of.*—The defendant was found with others around a card-table, with a faro-box and cards in his hands. Checks and money passed between them. No rebutting testimony. *Held* that this evidence was sufficient to warrant a conviction for gambling: *Missouri v. Andrews*, 43 Mo.

#### DAMAGES.

*Measure of.*—In an action against an agent for negligence, in not procuring full insurance, the measure of damages is the value of the property destroyed; to be reduced by any amount received under a partial insurance: *Beardsley et al. v. Davis*, 52 Barb.

#### EJECTMENT.

*Evidence of Title.*—In an action of ejectment, prior possession, accompanied with a claim of the fee, raises a presumption of title; and is sufficient to sustain an ejectment against one who shows only naked possession: *Dale v. Faivre*, 43 Mo.

## EXECUTION.

*Exempt Property ; Burden of Proof.*—Where, in an action against a constable, for returning an execution unsatisfied, when it might have been collected, the question arises whether certain property of the defendant in the execution was exempt from levy or sale, the affirmative is with the officer claiming the exemption. *Primâ facie* all property is liable to execution: *Baker v. Brintnall*, 52 Barb.

Exemption is a statutory privilege, and is strictly personal. It therefore will not avail an officer sued for neglect of duty in not levying on property: *Id.*

The question of exemption being one that a constable cannot raise in his defence, when sued for not levying and selling, his acceptance of the execution, and a bond of indemnity, with his consent to act upon the execution, and his action so far as to take an inventory of the property of the defendant in the execution, *estops* him, in law, from returning the execution unsatisfied: *Id.*

If he is not satisfied with the bond of indemnity he should refuse it. Having accepted it, he is bound to go on and act as instructed: *Id.*

## INSURANCE.

*Assignment of Policy.*—A policy of insurance was issued to John Franklin, payable to P. H. French. After loss French assigned to the Union Savings Association, and the latter assigned to John Franklin. In an action on the policy by Franklin as assignee of French, it was held that French as payee of the policy had a sufficient interest in the contract to sustain the validity of the policy. It is to be regarded in the same light as if assigned at its inception to French with the consent of the company: *Franklin v. National Ins. Co.*, 43 Mo.

*Subsequent Insurance.*—A policy of insurance contained the usual stipulation requiring notice and endorsement upon the policy or acknowledgment in writing of all previous and subsequent insurances, in default of which the policy should cease and be of no effect.

Held that a subsequent temporary insurance effected after the issuing of the policy, without notice, but not existing at the time of the loss, did not avoid the policy under this stipulation: *Obermeyer v. Globe Ins. Co.*, 43 Mo.

## JUSTICE OF THE PEACE.

*Docket.*—Although the statute directs that every justice shall keep a book called a docket, and also directs what entries he shall make therein, the omission, by a justice, so to keep his book will not render his judgment void. Proceedings before him can still be proved by himself: *Baker v. Brintnall*, 52 Barb.

For certain purposes, the docket fails to be evidence, if not kept as the statute directs, but the omission so to keep it is not jurisdictional: *Id.*

## JUSTICE'S COURT.

*Jurisdiction of the Person.*—Where a defendant, sued by long summons in a justice's court, in a different county from that in which he resided, appeared by attorney and put in an answer, the attorney stating

that the defendant resided in another county, but he did not plead that fact, nor would he make an affidavit of it: *Held*, that the defendant, by answering, waived any defence on the ground of residence, and thus gave the justice jurisdiction of his person: *Osborne v. Gilbert*, 52 Barb.

#### LEGAL TENDER NOTES.

Where a bond was conditioned to pay "in gold or silver coin of the standard by which the coins of the United States were regulated by the laws existing on the 26th day of May 1846, the sum of \$4000," in three years, with interest: *Held*, that the bond, and a mortgage given in connection therewith, were paid and satisfied by a payment in legal tender notes: *Murray v. Gale, adm'x.*, *etc.*, 52 Barb.

#### LIMITATIONS.

*Special Act*.—Action upon notes issued by the Kirksville branch of the Bank of St. Louis. By the Act of February 16th 1864, provisions were made for winding up the branch banks throughout the state. In this act it was provided that all claims, dues, and demands against said banks not presented within two years, should be forever barred, saving the usual disabilities. *Held* that this special limitation was legal, and that the notes in suit not being presented within the two years were barred: *Stevens v. St. Louis National Bank*, 43 Mo.

#### MARRIED WOMEN.\*

*Actions by*.—Since the acts of the legislature of 1860, chap. 90, and of 1862, chap. 172, a married woman may bring an action in her own name against a wrong-doer, for a wrong committed upon her person, without joining her husband with her as a party: *Ball v. Bullard*, 52 Barb.

To the damages which are recoverable for a personal injury to the wife, committed previous to the statute of 1860, the husband has no vested or other interest or right, legal or natural. Hence there is no ground for making him a party to an action therefor: *Id.*

As to the right to bring such an action, the statute of 1860 makes a married woman a feme sole. By suing as a feme sole, she accepts its provisions, and takes it subject to its letter, its spirit and intent, limitations and liabilities: *Id.*

And treating her as a feme sole, with the disability removed, the Statute of Limitations applies to the case, and if the action is not brought within one year, nor within six years, after the removal of her disability to sue, by the Act of 1860, it will be barred: *Id.*

#### NEGLIGENCE.

*Adjoining Tenants*.—The occupant of a second story is liable for the negligence of his servants in allowing a hydrant to flood the story below, and damage the goods of the occupant of said story: *Gass v. Calhoun*, 43 Mo.

*Contributing to the Injury*.—The negligence of the deceased, in order to defeat an action in favor of his widow for the injury causing his

death, must be direct and proximate in contributing to the injury; and an instruction referring to negligence generally was properly refused: *Meyer v. People's Railway*, 43 Mo.

*Evidence*.—In an action against an overseer of highways, for causing embankments or breaks to be made across the road, on a hill, whereby the plaintiff was thrown from his wagon and injured, evidence to show that within a week of the time of the accident, a person was upset at the same place, and a lady was thrown out of a wagon; and that about the time or within two or three months of the plaintiff's injury, several accidents of a similar kind occurred from the same cause at the place in question, is not admissible: *Sherman v. Kortright*, 52 Barb.

Where, in such an action, the plaintiff alleged, in one count of his complaint, that the defendant was fully informed and knew of the danger of the embankments placed by him upon the highway, and that he wilfully and wrongfully persisted in erecting and maintaining them across the highway: *Held*, that an issue being raised as to the defendant's malice and intentions, it was not erroneous to permit him to prove that he had no malice or ill will, or intention to injure the plaintiff: *Id*.

#### NUISANCE.

*Action against Continuer of*.—Every continuance of a nuisance is, in judgment of law, a fresh nuisance. An action can be maintained against the party continuing the nuisance; whether he be the original wrong-doer, or his alienee: *The Conhocton Stone Company v. The Buffalo, New York and Erie Railroad Company*, 52 Barb.

Although a corporation erecting or continuing a nuisance had leased the premises on which the same was erected to another, and given possession prior to the happening of an injury occasioned by it, it is liable for the damages sustained: *Id*.

An action for damages will lie against the continuer of a nuisance, without averring or proving a previous notice to him, of the existence and extent of the nuisance, and a request to abate and remove it: *Id*.

#### PRINCIPAL AND AGENT.

*Duty of Agent to his Principal*.—An agent, while in his principal's employ, can accept no employment hostile to the interest of his employer. If he does so, and receives remuneration therefor, it constitutes a breach of the contract between him and the company, and affords good and sufficient ground for his discharge. Nor can an agent act in the business of his agency, for himself and his principal at the same time: *Morrison v. The Ogdensburgh and Lake Champlain Railroad Company*, 52 Barb.

Thus, an individual employed by a railroad company, as its agent, to purchase wood and timber for its use, has no right, while purchasing woodland for the company, as such agent, to receive from the vendor a commission for promoting the sale. And if the company is compelled, through the agent's neglect of duty, to pay more for the land than it otherwise would have paid, the difference, being the amount of the agent's commissions, in equity belongs to the company: *Id*.

## SALE.

*Passing of Title to Personalty.*—The defendants agreed to furnish the plaintiff's intestate with tobacco of a certain grade, and at a fixed price per pound, for resale by the latter. The plaintiff's testimony tended to show that the tobacco was to be paid for "when sold" by the said intestate, the defendant's testimony tended to show that payment was to be made at "the end of the month" in which the tobacco was delivered, and if not resold by the said intestate at that time, then payment might be made another month. Under this state of circumstances the defendants delivered to said intestate 940 pounds of tobacco at the agreed price. Sales of it were made amounting to \$318, when the store of said intestate was consumed by fire and the residue of the tobacco destroyed. At a subsequent date the plaintiff's clerk paid the defendants the full amount of the tobacco, having no knowledge of the nature of the transaction. This suit was brought to recover \$622, the amount of the over-payment. *Held* that the transaction was a sale of the tobacco, and that the title passed at the time of delivery, and that an instruction referring the consummation of the sale to the time of payment after resale was erroneous: *Blow, adm'r. v. Spear et al.*, 43 Mo.

## TAXATION.

*Special Tax Bills.*—Under the charter of St. Louis city the cost of sewers may be assessed as a tax against the adjoining property. This assessment is made by the city engineer, who apportions it as a special tax against the property, and certifies in the form of special tax bills, the amount against each lot. The charter requires that this assessment shall be "against each lot," in the name of the owner. In an action to enforce one of these tax bills as a lien against the property, it was held that the clause as to ownership was only directory, and that the assessment against the lot was not vitiated by an error in respect to the ownership. An assessment against the lot of E. B. H. de Nouè, who owned it in her separate right, was valid, although made out in the name of L. de Nouè her husband: *City of St. Louis to use of Rotchford v. De Nouè et al.*, 43 Mo.

Under the same charter, a special tax bill for the construction of a sewer is properly assessed in the name of Mrs. Bernondy, she being the beneficiary of the lot, although the naked legal title was held in the name of Mr. Garesche for her use and benefit. There would be no law for rendering a personal judgment against Mr. Garesche. Nor could a personal judgment be rendered against Mrs. Bernondy, she being a married lady. The tax could be enforced only as a special lien against her separate estate: *Creamer v. Bernondy et al.*, 43 Mo.

*State Income Tax—Legality of.*—By the Act of February 1865, it was provided that a tax of 2 per cent. upon incomes should be collected for the year 1865. It was also provided that the assessment should be based upon the amount of income received in the year next preceding the time of assessment. *Held* that an assessment for the year 1865, upon the amount of income received in the year ending March 31st



1865, was irregular, but not void, except as to part of the time covered by it. An officer executing such a tax bill is not liable for trespass. *Held* also that such an income tax is not in violation of that provision in the Constitution, which requires all property subject to taxation to be taxed in proportion to its value: *Glasgow v. Rowse*, 43 Mo.

#### TAXES.

A village tax collector, leaving a tax warrant in due form of law made out against the tax payers of the village, among whom are various stockholders in a bank, some of whom refuse to pay their taxes, and others direct him to call at the bank and receive their taxes, has no right to take from a drawer in the bank, without the consent of the officers, sufficient money to pay the taxes of such stockholders; even though each person named as a stockholder on the assessment roll and tax warrant may have left with the bank dividends unpaid, sufficient to pay his taxes: *The First National Bank of Sandy Hill v. Funcher*, 52 Barb.

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FORENSIC AND LEGISLATIVE DEBATE IN AMERICA, AS COMPARED WITH ENGLAND AND FRANCE. COMPARISON OF THE PRESENT AND THE PAST IN OUR OWN COUNTRY.

THERE is a pretty general opinion prevailing among the most thoughtful and observing in this country, that, for some reason, forensic eloquence and the power of public debate is not, and has not been for the last thirty years, much on the advance; and there are not a few among us who declare that it is on the positive decline, from year to year, and almost from day to day. There is no doubt some allowance to be made for this opinion among those considerably advanced in life, on the score of the effect of novelty and familiarity, in the estimate of everything. The familiar maxim, that no one is a hero to his *valet de chambre*, has a wide application. It is upon this principle that, to an old man, almost everything is upon the decline. We have a keener relish for everything in the outset of life, and we more readily give in our adhesion to the theories and opinions of others than after our own opinions and theories are more fully established, and thus we naturally pass a higher estimate upon all we meet in early life than afterwards.

But there is something more than this required to account for the contrast we everywhere notice, in Congress, and at the bar, and in state legislative assemblies, between the manner and effect

of public speaking twenty and thirty years ago, and at the present day. It is more difficult to assign any adequate reason for the wonderful falling off in the effect of public speaking since that time, than it is to establish the fact of the decline, or, at least, the change. But that there has in some way a change come over us in this respect there can be no question. There is not, perhaps, quite so much difference in the quality and character of the published speeches then and now, as in the effect produced by their delivery, but there is a difference in both. There are a good many learned and logical, and some eloquent, speeches now delivered, at long intervals it may be, both at the bar, and in legislative halls, and during the political campaigns from year to year. But we hear of no such overwhelming effects produced by these speeches now as formerly. There has been no such debate in Congress, in the last ten or twenty years, as there were many at an earlier day. The debate on the Jay Treaty, the reply of Webster to Hayne, the debates on the Removal of the Deposits, and many others, were of a character never equalled in modern times. But how to account for the contrast is certainly a very embarrassing problem.

We were never exactly of the number of those who believed the race of public speakers, or any other class of gifted men, was positively deteriorating, and would speedily become extinct. There may be exceptional cases, of men of very rare gifts, in forensic eloquence and public debate, which do not recur in short periods. It is scarcely to be expected that we should have another man, very soon, exactly filling the place of Daniel Webster. He was a man, not only of the rarest and most eminent gifts as a forensic and public speaker, but one almost *sui generis*. No observing and thoughtful man could possibly look at him, in his full strength and prime of life, about the halls of the Senate and House of Representatives, or the bar of the Supreme Court, and not yield an involuntary assent to the general testimony, that he was a wonderful man. And then it was equally apparent to the most careless looker-on at Washington, from 1830 to 1835, and onward for ten years, that Webster really had no rival there, in the effective power of eloquence. The palm of eloquence, both at the bar and in the Senate, was as universally conceded to him, as that of military genius was to Napoleon, or Wellington, or Washington, in their time. No man then thought of calling it in

question. He was the *facile princeps* of all assemblies where he appeared.

And the great superiority of Mr. Webster is not in any sense to be accounted for, upon the ground that he was surrounded by a class of inferior men. Nothing could be further from the truth. His associates and his opponents equally, were all men of the highest order of talent, and many of them possessing most uncommon power of wit and eloquence. There were not only Clay and Calhoun, confessedly men of the most surpassing powers of persuasive eloquence in debate, but there were scores of lesser lights, such as John Tyler, John Forsyth, Felix Grundy, T. H. Benton, Silas Wright, Theodore Frelinghuysen, Samuel L. Southard, and many others in the Senate; and John Quincy Adams, Edward Everett, George Macduffie, Tristram Burgess, James K. Polk, Henry A. Wise, John Randolph for a time, and numerous others, in the House of Representatives, any one of whom might be regarded, in the power of public debate, quite an over-match for any one who could now be selected, either from the Senate or the House of Representatives. And still it is by no means certain that the present generation of public men in our national legislature is not possessed of equal general ability with those who occupied their places in the last generation. But it is certain that, for some cause, the quality of public debate has surprisingly declined, till it has become very tame and inefficient.

There is doubtless something due to the consideration that we are now dealing with much larger pecuniary interests than in that early day, and that for some reason, not very easily defined, these large pecuniary interests are vastly corrupting and sordid, and debasing in the influences which they produce; by which they act and are acted upon. Thirty years ago, it would have been regarded as a contempt upon our National Legislature, punishable by fine and imprisonment, for any one to have hinted that pecuniary considerations of any character could have had, either directly or indirectly, the remotest influence in carrying any measure through Congress—and the same was then true in regard to our state legislatures; and the same is still true of the British House of Commons. But now the case is certainly very essentially changed in this country. We not only have these damaging insinuations uttered in regard to the most effective measures of currency and commerce, of the tariff and internal revenue, but it

seems to be regarded as no discredit to any one that it should be generally conceded that no general and public measure of great pecuniary consequence, and especially no private enterprise of any character, can be there trusted to its fate on the high ground of merit and innate desert, without being absolutely certain to find an early grave and few mourners. It has come to be so well and so universally understood everywhere, both in state legislatures and in Congress, that no railway bill, no land grant, or public guaranty for a loan of credit to any public enterprise, can be obtained without the expenditure of fabulous sums of money, in direct pecuniary bribes, for the influence of members of the legislature, that any one who should attempt any such thing in the old-fashioned, honest, direct, natural, and straightforward mode, would be regarded as conducting with about the same degree of absurd simplicity as if he should ask the professional assistance of the bar as a gratuity! The thing is never attempted and never thought of by any one who comprehends the agencies by which all such public patronage is secured, and the obstacles which must be bought up, as it is called, before any progress can be made.

It will be obvious, then, at a glance, that the scope for the influence of public debate must be very essentially narrowed by such agencies. The man who feels that his supporters are all paid for their services, in advance, will scarcely prepare himself with the same watchful care to present the arguments in its behalf, which are only expected to influence the outside world, as if he expected his cause were to be determined upon the weight of argument, in the first instance, and that the issue of his undertaking depended mainly upon the form and manner in which it was presented to the body having the power to pass upon it. We hardly know whether it is this cause mainly, or others combining, which has led to one great and distinctive contrast, more marked than all others, between the debates in legislative assemblies in this country and in England. There is doubtless another consideration whose tendency is in the same direction, but that is the same in England as here. We refer to the practice of making all leading measures, especially those of a public character, entirely partisan, and requiring every member of the party to follow their leaders at the peril of absolute ostracism. This, of itself, converts the debates from an address to the members of the House, into an appeal to the public at large. This would naturally lead

towards the same distinction we everywhere observe between the character of the debates in Congress thirty years ago and the present time, and which does not seem to have obtained much foothold in England.

But we refer especially, as a contrast with the British Parliament, to the almost universal practice in the American Congress of reading, *verbatim et literatim*, written and sometimes printed speeches. The practice of reading written essays of interminable length and invincible stupidity has come to such a pass in Congress, that for some years it has been customary to hold evening sessions, exclusively devoted to reading speeches. Nobody attends these sessions except the readers and their hired attendants! mere essays, so to speak, as void of the spirit and fire of eloquence, as a philosophical thesis. No such thing as a written speech would be, for a moment, tolerated in the British House of Commons, nor indeed in the House of Lords. A debate in either of those assemblies is still a veritable debate. The House of Commons not only would not allow any member to read a written speech, but they will not allow any member, after his maiden speech certainly, to deviate in the slightest degree from the very point of the question before the House. This latter requirement would make short work with most of the elaborate essays which are painfully read, but never listened to, in Congress. Nine-tenths of them have not the slightest bearing upon the particular question before the House. And this practice is not peculiar to discussions, when the House are in committee. It is the same in all debates. Every prepared and studied speech is written out and read. There can be no reasonable objection to any amount of study and previous preparation, when one is called to discuss important questions of great public moment before legislative assemblies or the judicial tribunals of the country. We should regard it as a great misfortune to have, on such occasions, any but the most thoroughly studied arguments or speeches. And there are many occasions of a literary or scientific character, as on the inauguration of a school, or the institution of a professor, and numerous others where general usage demands, or expects, a formally written address, and where nothing else would be acceptable or appropriate.

But that all our public questions should be discussed by essays prepared under the weary watchings of the midnight lamp,

is certainly not calculated to improve the quality, so much as the amount of our public speaking. It may be true, that a large proportion of our members of both houses of Congress come into office, without any such previous training as will enable them to discuss public questions without writing. But that was always so, and probably always will be. And nothing is lost, by allowing such members to listen and vote in silence. There would, no doubt, be fewer persons to discuss these public questions. But they would be none the less ably discussed or less thoroughly understood on that account. And the most inexperienced debater, if he remain long enough in Congress, will very soon be able to make himself understood without writing, if he really have anything worth communicating. And if it is done in ever so bungling and stammering a way, it will be the more listened to, if it be really valuable and worth hearing. A written speech necessarily becomes prolix and vapid. There is nothing which will compel a public speaker to condense, and to come directly to the point, like the consciousness that he depends upon his present effort of mind to put the matter in shape, and upon the interest of those whom he addresses for an auditory! If he fail to create an immediate and constant interest, he falls never to rise again.

In the British Parliament you will hear somewhat distinguished public debaters pushed to the last extremity often to find words to give utterance to their feelings and opinions, and this will sometimes extend over a considerable period of time, ten or twenty and even thirty minutes. There are not, at the present time, above half a dozen fluent speakers in the House of Commons—scarcely one so fluent as were some American debaters of the last generation. Mr. GLADSTONE is almost the only one we had the pleasure of listening to who seemed entirely self-possessed and at the same time entirely fluent, never hesitating for a word or an utterance. Mr. JOHN BRIGHT is entirely self-possessed and sufficiently fluent, but he labors, at times certainly, under great difficulty of utterance. He is said to be afflicted latterly by a most embarrassing bronchial irritation or infirmity of some kind. But Mr. Bright is always interesting, both in his manner and his matter. He is apparently more entirely earnest and sincere than almost any public man you will meet, either in England or America. You are never at a loss to understand where his opinions range, and when he rises to speak he commands uni-

versal attention, both from liberals and conservatives. He has no crotchets and no trammels. His views are peculiar, and in some respects extremely radical. He has no veneration for traditions of any kind, either in church or state. He sincerely believes that cold logic and the iceberg of reason, unilluminated and unwarmed by any ray of life or heat, are entirely adequate to solve all the perplexing problems of civil and ecclesiastical polity. And every word he utters is replete with good sense and good feeling, and commands the deepest, most earnest attention of all who come within the range of his voice. But just think of John Bright sitting down to compose a speech for the House of Commons, and then standing up for two hours to deliver it! He could not read five minutes before he would be coughed down, and if he could be patiently listened to by men laboring under the same infirmity of having to read their speeches, he could not possibly command any influence in the House, since all the power of a controlling mind in debate arises from turning the exigencies of the passing moment to account.

When the first great debate in the House of Commons on the Reform Bill was opened, in the early spring of 1867, we heard DISRAELI, GLADSTONE, BRIGHT, ROBERT LOWE, LAING, WALPOLE, and some ten or twenty others discuss the subject more or less in detail, and all within the space of three or four hours. If those men had attempted to do the same thing on paper, it must have required three or four days or even weeks instead of as many hours; and instead of the auditory remaining quiet and attentive listeners throughout the debate, nobody could be found stolid enough to sit through such a hearing. There are two leading speakers in the House of Commons, DISRAELI and LOWE, whose speeches have much the appearance of having been, to some extent, and in considerable portions, pre-composed and learned by rote. And in regard to Mr. Lowe especially, there could be no question such is the fact to a considerable extent. But Mr. Lowe is not an effective speaker, merely as such. His great forte consists in the elaborate character and thoroughness of his exposition of all subjects he undertakes to discuss. Mr. Disraeli is a wonderful man in almost every point of view in which he is considered. He is a man of great sensibility to the opinions and feelings of others, and who reflects them with great accuracy; of great research and study, both of men and things;



of most amazing memory and power of illustration; and above all, he seems, in a very studied and artificial manner, to adapt his discourse to the demands of the occasion with most amazing wisdom and tact. So that, without being an eloquent man or a ready debater, he is really one of the most persuasive speakers of the age.

It is perhaps due to the occasion to say that Mr. Gladstone is, at the present time, the most observed, the best abused, and the most able and skilled debater in the House of Commons. And he pushes straight on towards his point and main purpose with such directness of aim, and such energy, that one almost forgets the freedom and elegance of his manner, and the power of his eloquence, in watching the polished smoothness and beauty of his logical sequences. There are no jars, no breaks, and no pauses in his onward rush. And if he is not always in the right, he is sure to be most exquisitely captivating in all that he says; and there is such power and force in his logical deductions, that one is scarcely safe in listening to him, unless we adopt the theory of his absolute infallibility, which it is not quite safe to affirm of any one in these degenerate days, or unless one come to cavil, and then he is in great danger, of conversion.

If our readers will pardon the digression we would be glad to bear testimony here, to our own great admiration of Mr. Gladstone's genius, eloquence, and purity of purpose. It is certain that his history has developed the most surprising, and sometimes the most sudden and inexplicable, changes of opinion. This, in the case of a public man, and especially a great political leader, naturally leads to severe and often unjust criticisms. The theory of parties in free governments is that their dogmas are infallible, and consequently can never change. If, therefore, we find a man so far reversing all his early opinions, and especially upon religious subjects, as to find himself, as Mr. Gladstone has, passing from the association with the extreme high church into the cordial embrace of the extreme low church, and even the no church party in the realm, the conclusion is not unnatural that he must have acted largely upon the principle of expediency. But when it is considered that the times have changed far more than the man, and that the same opinions or the same remedies, which are now indispensable to maintain the quiet and good order of the kingdom, would have produced a convulsion thirty years ago, from

one border of the land to the other, we need not feel surprise at the apparently new attitude in regard to the church in which Mr. Gladstone finds himself. If there is any fatal fallacy in Mr. Gladstone's character, and one which has led him more astray than all others, it is the dogged determination to follow out all his theories and speculations to their logical consequences, wheresoever that may lead him. That is indeed a beautiful theory of character, and one that savors largely of nerve and consistency, and honest purpose; but there is no plan or purpose of life more fallacious. Every man is bound to test the correctness of his theories by their practical working, and to know and admit, that when this latter test fails, there must be some innate, although invisible, defect in his logic. If Mr. Gladstone has failed at all it has been in this respect, in following too implicitly the logical consequences of his speculative theories.

We are not sufficiently familiar with the debates in the *Corps Legislatif* in France to be able to speak with much confidence of the mode of preparation. We believe it is more elaborate than in the British House of Commons. But we did not learn that anything at all approaching the slipshod and slovenly mode practised in our Congress ever obtained there. If speeches are sometimes precomposed for debates there, the offence of reading them is never attempted. There is far more action in French public speaking, both at the bar and in the *Corps Legislatif*, than in England or here, and public speaking becomes effective there as much on account of the manner as the matter.

In preparing cases for argument, in the French courts of justice, the practice is far more like the American, than in the English courts. And from considerable opportunity to watch the progress of trials both in the French and English courts, we have felt compelled to give in our adhesion to the latter. The trial of civil causes in the French courts conforms very nearly to that of the Roman civil law, and is somewhat analogous to that which is pointed out in the New York code of civil pleading and practice, and which has been largely adopted in a considerable number of the other states, with more or less modification. It consists of a general declaration, bill or plaint, setting forth briefly the cause of action. Then comes the answer, which consists mainly of denial, but sometimes introduces new matter of defence, as tender, payment, set-off, the Statute of Limitations or lapse of time, arbi-

tration and award, former recovery, &c., &c. The testimony is then taken, presumptively, before the court, but in practice, before a prothonotary or commissioner, and often, as in our chancery proceedings, is very voluminous and somewhat difficult to digest, in such a manner as to be readily understood.

The practice is in the French courts for the counsel to prepare and print, if they choose, which is commonly the case, what is there called a *Mémoire*, a memorial, or brief, rehearsing the important testimony on either side, with the arguments and legal precedents to which it is desired to refer the court. This sometimes extends to fifty or a hundred or more large quarto pages, and is thus, in itself, a laborious study. And after all it is not the case, but only a partial and one-sided statement of it. There is no doubt room for the exercise of great skill and ingenuity in getting up such a brief. And in many cases it may become of very essential aid to the court where it desires to obtain a thorough understanding of the cause. But even in that case, the only reliable course is for the court to examine the original papers and carefully read them. In any other course the judge is not only exposed, but almost sure, to be misled by the partial or imperfect statements on either side. The result generally is, that the court never attempt thoroughly to master the cause. The reading of the testimony is often wholly omitted, and the court depend upon the statements of the counsel, and even that is often omitted to be read at length, the counsel contenting himself by referring the court to the statements upon his brief. And every one who has had much experience in these matters knows how very irksome it is to the court, after an argument is closed, and the papers bundled up and laid aside, to recur to it again. There is then a direct temptation, in the mind of the court, to study to have the cause turn upon some issue, not of the essential merits of the cause, but which may be raised upon the concessions of counsel, or upon the admitted and well-known facts in the case, without the necessity of examining the testimony in detail. We have known complicated and voluminous cases in the American courts to share this fate, and we have been credibly informed, from the most reliable sources, that the same thing often does occur in the French courts.

Indeed it is fair to say we have known it to occur there. During an important trial in the Court of First Instance of the

city of Paris, a court of the most extended civil jurisdiction, although not final, there being an appeal to two higher tribunals in succession, the Imperial Court, and the High Court of Cassation, which is the final arbiter in all matters, whether civil or criminal, we noticed the judges sitting in quiet indifference, hour after hour, while the counsel on either side read most elaborate and inconclusive essays both upon the law and the fact. And it was evident to the slightest observation that the court were really obtaining or tending towards, no definite opinion of the merits of the cause. The argument was indeed closed by a very pertinent, and, as usual with that distinguished advocate, M. Berryer (it was one of his last great efforts at the bar), a most eloquent appeal on behalf of the plaintiff, which the court felt predisposed to reject on the ground of its political bearing. For the administration of justice in France is essentially political, by which we mean that it is virtually, and indeed formally, a department of the imperial cabinet, the Minister of Justice being constantly present by himself or deputy in the trial of all civil actions. And the cause just referred to being an action on behalf of the United States Government against a citizen of France, somewhat prominent in civil position, and a member of the *Corps Legislatif*, for the recovery of property of a public character, deposited in his hands by the late so-called Confederate States for purposes hostile to us during the late rebellion, naturally called into exercise the feelings engendered in France during the civil war in America; and as naturally roused the eloquent M. Berryer to a most graphic exposition of his cause, and the injustice attempted to be inflicted upon the United States by fitting out ships of war in France to prey upon our commerce.

The effect of this eloquent exposé of the wrongs attempted upon the old established national government, by the defendants in the action, in building privateers or piratical craft, to burn and destroy our mercantile marine, although a very natural thing for M. Berryer to do, and a very pleasant thing for a patriotic American to listen to, did not prove equally advantageous, in procuring the favorable ear of the court on our behalf. For, the moment M. Berryer had closed his pungent and rather damaging harangue, so far as the defendants' general conduct was concerned, the Minister of Justice gave notice to the court, that at their next session he should feel it his duty to submit some considerations bearing upon

the decision of the cause, which proved to be of a very destructive character, in regard to the interests of the United States, and the court naturally followed the lead of the Minister of Justice.

But we have occupied so much space that we shall feel compelled to be more brief in regard to the English mode of preparation and argument of causes, than we had purposed at the beginning of this article. There is one thing, especially, surprising to all American lawyers, that while with us the judges invite, and by their rules require, written or printed briefs of the points of the argument, no such thing is expected, or even tolerated, in any of the English courts. The counsel may make any extent of written or printed memorandum of his argument or authorities, which he finds convenient or desirable for his own use, but on no account will he venture to offer the same to the judge, and the judge never invites the surrender of any such brief. And in practice no such briefs are made as among us. There seems to be a very decided opinion, both at the bar and among the judges there, that such a thing would be in bad taste, if not positively offensive. The English judges have paper-books in which they enter memoranda of points, &c., during the argument. There is, in some of the States, a practice among the bar of handing the judges their briefs, throughout the docket, at the opening of the term, which always had to us rather the appearance of an effort to secure the ear of the court at the earliest moment. But as the opportunity is equally open to all sides, there does not appear to be any impropriety in that practice even. We question whether it gives much advantage any way. But it contrasts strikingly with the English practice.

But we desire to contrast the English practice with our own in another particular. It seems to be supposed with us, that unless the case is one that may fairly be regarded as frivolous, the court will hold it under advisement, and deliver a formal and prepared judgment. But in the English courts the rule is precisely opposite. It is understood there, that if the case can be decided at the hearing, with the concurrence of all the judges, it will be. More than three-fourths of the causes in the Superior Courts, and many in the courts of appeal, are so decided there. Under such a practice, extended briefs and memoranda of authorities are of very small account to any one. It is our practice of reserving judgment, and revising our first impressions,

which has led to the practice of requiring briefs. But in fact, where the court have any very great amount of labor to perform, we fear, these revisions are rather apparent than real. We have known some very able American judges, who always insisted that the impressions which they obtained of a cause during the argument were the very best they could ever reach. And we have known others who seemed to require long time for reflection upon a difficult cause, who spent days, and perhaps weeks, in turning the matter over in the mind, without ever recurring to the briefs, or reading the authorities, and the counsel would find their rows of books, carried into the court-room, just as they left them unless the judge happened to be thoughtful enough to disarrange them, to keep up the appearance of having read them!

In a hearing many years since before a committee of the House of Commons, where this subject came under discussion, Lord ST. LEONARDS declared that in his whole judicial life he had made it the rule to deliver judgment immediately upon the conclusion of the argument. There can be no question that in this mode the arguments become more compact, and very much more to the point, and that the mental discipline both to court and bar is far more effective. It is impossible for one to sit through the hearing of an important law question in any of the Superior Courts in Westminster Hall, or the Courts of Chancery in Lincoln's Inn, and not feel that every one concerned in the hearing, court as well as counsel, have made it a personal effort to contribute all in his power to bring the case to the point of determination as speedily and as fairly as it could be done. They have appliances in the courts of Westminster Hall for this very purpose. The court rooms are extensively lined with such law books as are in most constant request, among which are all the most approved digests and elementary treatises as well as reports. And at every new turn in the argument, the judges are constantly sending their messengers for one book and another, and in this way they are enabled to correct, as far as practicable, as they go along, the over-statements and false impressions of the counsel. And it is not uncommon to have four or five counsel employed in the argument of important causes on either side, each contributing his portion as the argument proceeds, and each, in order of seniority, beginning with the highest, making a formal argument to the court.

It cannot be denied that this course of practice is more

difficult, and makes larger demands upon the ready learning and mental resources of the profession, than that which has come into vogue in the American courts, where the counsel sometimes prepares a brief of fifty or more closely printed pages, and feels bound to read, if not to discuss, the whole extent of it before the court. Under such circumstances he feels himself almost unfairly treated if the court interrupt him by impertinent questions, and he naturally supposes that they are becoming impatient. The court have no alternative but to sit quietly, and endeavor to keep up the appearance of listening.

The arguments before the Law Lords, on appeals to the House of Lords, are more formal, and less conversational, than in most of the other English courts. But there is one practice at the English bar which tends very much to increase the interest of law arguments—the same counsel very seldom reargue a cause, either in the same or an appellate court. I. F. R.

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#### RECENT AMERICAN DECISIONS.

##### *Supreme Court of Maine.*

##### ELLEN WILSON v. GRAND TRUNK RAILWAY COMPANY.

The holder of a railway passenger ticket is only entitled to passage with such personal baggage as he carries with him at the time. Baggage sent by an after train will be at his risk, and not that of the company.

APPLETON, C. J.—The plaintiff was a passenger on board the defendants' cars, having seasonably paid her fare. Her baggage was not with her, it having been left behind without any fault of the defendants. Some two or three days afterwards it was left in the charge of their servants to be transported to the Empire station, on their line, but it never reached its place of destination. This suit is brought to recover the value of the baggage lost.

The presiding judge instructed the jury, "that, if they should find that the plaintiff went on board the defendants' road as a passenger on Tuesday preceding without baggage, and that the trunk and its contents were ordinary personal baggage, such as a passenger would be entitled to take without extra charge, it was not necessary there should be proof that anything was paid for

carrying the trunk between the same points; that the price paid by the plaintiff for her own passage, and the evidence in the case, if found to be true, were sufficient consideration for the promise alleged in the writ."

As the plaintiff's trunk was taken for transportation some days after she had passed over the defendants' road, the substance of the charge of the presiding judge was, that the price paid by the plaintiff for her ticket included the compensation due to the defendants for their subsequent transportation of her trunk—the trunk and its contents being personal baggage. In other words, it was not necessary that the baggage of the passenger should go with the passenger, but that it might be forwarded subsequently and without any additional charge for its freight.

The fare for the passenger includes compensation for the carriage of his baggage, as to which the carriers of passengers are to be regarded as common carriers. There need be no distinct contract for the carriage of the baggage. The fare of the passenger covers the compensation for the freight of the baggage. The baggage must be ordinary baggage, such as a traveller takes with him for his personal comfort, convenience, or pleasure for the journey. It must be the "ordinary baggage" of a traveller, regard being had to the journey proposed.

It is implied in the contract that the baggage and the passenger go together. "The general habits and wants of mankind," observes ERLE, C. J., in *Phelps v. L. and N. W. Railway Co.*, 115 E. C. L. 327, "must be taken to be in the mind of a carrier when he receives a passenger for conveyance; and the law makes him responsible for all such things as may be fairly carried by the passenger for his personal use." In *Cahill v. L. and N. W. Railway Co.*, 100 E. C. L. 172, WILLES, J., says: "Where a passenger takes a ticket at the ordinary charge, he must, according to common sense and common experience, be taken to contract with the railway company for the carriage of himself and his personal luggage only; and that he no more extends the contract to the conveyance of a single package of merchandise than of his entire worldly possessions." In *Smith v. Railroad Co.*, 44 N. H. 330, BELLOWS, J., uses the following language: "Until a comparatively recent period, the English courts were inclined to hold that carriers of passengers by stage-coaches and otherwise, were not liable for injuries to their baggage, unless a distinct price was paid



for its transportation. But it is now well settled that the price paid for the passenger includes also the personal baggage required for his personal accommodation; the custody of the baggage being regarded as accessory to the principal contract. \* \* In general terms it may include not only personal apparel, but other conveniences for the journey, such as a passenger *usually has with him* for his personal accommodation." "The baggage," observes MULLIN, J., in *Merrill v. Grinnell*, 30 N. Y. 619, "must be such as is necessary for the particular journey that the passenger is, at the time of the employment of the carrier, actually making."

It follows from the nature and object of the contract that the right of the passenger is limited to the baggage required for his pleasure, convenience, and necessity during the journey. As it is for his use and convenience, it must necessarily be with him as it is for him. He may reasonably be expected to exercise some supervision over it during and be ready to receive it at the expiration of his journey. In the present case the baggage of the plaintiff was forwarded two days after she had passed over the road. If its transmission may be delayed two days and the carrier is required to take it without any compensation save the fare paid by the passenger who had preceded it, it may equally be delayed weeks or months, and the carrier be required to forward it without any additional pay. It presents a different question when the delay is caused by the fault of the carrier or there is a special agreement with him or his agent for the subsequent transportation of the passenger's baggage.

The fare paid by the passenger over a railroad is the compensation for his carriage and for the transportation, at the same time, of such baggage as he may require for his personal convenience, pleasure, and necessity during his journey. Baggage subsequently forwarded by his direction, in the absence of any special agreement with the carrier or of negligence on his part, is liable, like any article of merchandise, to the payment of the usual freight.

Exceptions sustained.

The foregoing opinion unquestionably places the case upon the true ground—that in the absence of all contract or consent on part of a railway company, they are under no additional duty or obligation to a passenger by reason of his purchase of

his ticket beyond that of safely carrying him to the point indicated on the ticket, together with such personal baggage as he may find it for his convenience to carry with him, not exceeding the limit fixed by the rules and regulations of the

company. There can be no possible question that, aside from special circumstances indicating the actual or implied consent of the company to allow the baggage of the passenger to go upon a different train from that on which the passenger himself goes, there is no obligation whatever to carry the baggage at all, except in the usual mode for special compensation. It is of the very essence of the implied stipulation on the part of the company to carry a reasonable amount of personal baggage with their passengers, that it shall go upon the same train with them. The care which the passenger himself exercises over the baggage is of the greatest importance to its security. In England, when the passenger changes from one main line to a branch line, in order to reach another main line, he is always expected to point out his baggage, and if he do not, is specially inquired of if he have any, and if so, requested to point it out, and if he fail to do it, is sure to fail of finding his luggage at the end of his route. Under such circumstances there would not be the slightest safety in trusting luggage to go by any mere passenger train without some one to look after it. Perhaps this uncertainty is somewhat peculiar to England, or the United Kingdom of Great Britain, since here the companies never give any check for luggage, as they call it, while upon the Continent the companies all give formal receipts or bills of lading for baggage, and checks are also given by our companies which have the same force.

This consideration of giving a check or bill for the baggage is of some importance in regard to the responsibility of the companies. As a general thing, railway companies never do this, except in connection with a ticket for passage. In all other cases, the baggage must go by express, or by the parcels office, as the expresses are called in Europe. We think most railway companies would scout the

idea of sending baggage by passenger trains, separate from the passengers, as the height of absurdity, unless, perhaps, where the company had been in fault in not forwarding it at the proper time, or by having sent it in the wrong direction. But there is no doubt it would be entirely competent for the company to assume a special undertaking of this character. And where the servants of the company, being informed of the fact that the passenger did not intend going by the same train, in consequence of being delayed, or having gone before, or for any other reason, understandingly accept baggage, to go in the passenger train, without any accompanying passenger, we are not prepared to say that the payment of the price of transportation should make any difference in regard to the duty or responsibility of the company. It is hardly to be supposed that the company would undertake any such office as a mere gratuity, unless for some of its officers, agents, or employees. The very fact of undertaking the duty by the servants of the company, without any additional compensation, would seem to indicate very clearly that they understood the service was compensated by the fare paid by the passenger. How far the servants and employees of a railway company could fairly be regarded as acting within the scope of their employment in making such an extraordinary contract, seems to us very questionable. Unless the company had been in fault in regard to the transportation, so that it had become their duty to see it carried, and their servants were therefore strictly in the line of their duty in forwarding it, in which case they would unquestionably have the power to bind the company in selecting the mode of conveyance; unless this or some exceptional case were presented, it seems to us, as we said, very questionable how far the servants of a railway company could be said to act within the scope of

their authority in forwarding baggage by passenger train without the owner going at the same time. It is certainly well understood by all persons at all conversant with the subject (and all who deal with servants are bound to learn the general course of the business), that this is not the common course of forwarding baggage; and that being so, any one desiring to have his baggage forwarded in that mode must be assumed to understand that this is not within the ordinary scope of the servants' employment, and by consequence, that they have no authority to bind the company by any such undertaking.

But if the general superintendent of the railway should direct the servants of the company, in a particular instance, to forward baggage in this mode,

and to give a check accordingly, it does not seem to us that this ought to be regarded as a gratuitous undertaking, and so not binding the company as common carriers. We should certainly regard them, in that precise case, as common carriers for hire, although no separate price was paid for the baggage, but only the ordinary fare for the passenger and his baggage. It seems to us more natural to treat the contract of the company as only extending to the waiver of their right to have the baggage go in the same train with the passenger, than to the waiver of all compensation for the transportation, that being at variance with the entire scope of their creation and action; the other being only a modification in a very slight but not altogether unimportant particular. I. F. R.

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### *Supreme Court of Missouri.*

GILES F. FILLEY, RESPONDENT, v. A. D. FASSETT ET AL., APPELLANTS.

The complainant having first appropriated and applied the name of "Charter Oak" to a certain pattern of stoves manufactured and sold by him, will be protected by injunction in the exclusive use of the name as a trade-mark.

Any contrivance, design, device, name, or symbol, which points out the true source and origin of the goods to which it is applied, or which designates the dealer's place of business, may be employed as a trade-mark, and the right to its exclusive use will be protected by the courts.

The appropriation of any prominent, essential, or vital feature of a trade-mark by another, is an infringement. If the trade-mark is simulated in such manner as probably to deceive customers, the piracy may be checked by injunction.

The statute of Missouri providing for the filing of a description of any trade-mark sought to be used, was not designed to abridge or weaken the right to any trade-mark which may be acquired in the usual way. It does not authorize the appropriation by one party of a trade-mark the title and ownership of which belongs to another.

APPEAL from St. Louis Circuit Court.

In 1851 the plaintiff employed N. S. Vedder, stove-pattern maker of Troy, N. Y., to design and construct for him a set or series of cooking-stove patterns. The patterns were made as

ordered, and in a form which resulted in the production of a cooking-stove of a new and improved interior arrangement and construction, for which Vedder obtained letters patent, which he assigned to the plaintiff. The plaintiff originated and applied to the stove the name "Charter Oak," which was so formed upon the patterns as to produce the name upon the manufactured article, in combination with a sprig of oak leaves. This name and device was employed to distinguish and designate cooking-stoves of the plaintiff's manufacture. The manufacture and sale commenced the following year, and has been followed up continuously ever since.

The testimony showed that stoves are usually known in the trade by their distinctive names, such as "Excelsior," "Climax," "Empire," "Charter Oak," &c.; and that they are advertised and bought and sold by such names and designations; that when a stove is favorably received and acquires popularity in the market, the peculiar name by which it is known becomes a matter of importance to the manufacturer, and of great value to him in the prosecution of his business.

The answer denied that the plaintiff first appropriated and used that name in such connection, as indicating the source and origin of the article to which it was applied; and denied that his use of it had been either exclusive or uninterruptedly continuous; and averred that the contrary of all this is true.

*C. L. R. Moss*, for appellants.

*Samuel S. Boyd*, for respondent.

The opinion of the court was delivered by

CURRIER, J.—Upon the issues a large mass of testimony was taken, from which the following facts are deduced:—

1. That the plaintiff's appropriation of the name "Charter Oak," as already detailed, was prior in point of time to any similar use of that name by any other parties. The testimony is clear and entirely satisfactory on this point.

2. That notwithstanding such appropriation by the plaintiff, different manufacturers in Cincinnati, and in that region, at different times subsequently to 1852, applied the same name to cooking-stoves of their manufacture, but without the consent of the plaintiff in any instance, and without his knowledge, except

in two instances. The first of these two occurred in 1854, and was at once checked by the plaintiff, and abandoned by the Cincinnati manufacturer on being apprised of the plaintiff's rights. The other is that of the manufacture of stoves, the sale of which, with the plaintiff's alleged trade-mark upon them, is sought to be enjoined by this suit; and the suit was commenced immediately after the facts came to the knowledge of the plaintiff.

3. That J. S. & M. Peckham, of Utica, Oneida county, N. Y., manufactured in Utica a "Charter Oak" cooking-stove, from 1852 to 1857, and then abandoned it, and never after-resumed the manufacture of that particular stove. The Peckhams purchased their patterns for this stove of said N. S. Vedder, Filley consenting to the sale on condition certain alterations were first made in the patterns. This transaction does not appear to have included specifically the right to use the plaintiff's trade-mark, nor does it appear that Filley was ever made aware that the purchasers in fact used it. The design of the stove was patented, and the transaction with the Peckhams involved the granting to them the right to manufacture in Oneida county its patented features. That, with the right to sell in a defined territory, would seem to have constituted the inducement to the purchase of these patterns rather than others. The particular name which the plaintiff had originated for the stove which he proposed to make does not appear to have been mentioned in the negotiations with the Peckhams, or to have been in the minds of the parties. It ought not therefore to be inferred from the mere permission granted to Vedder to sell the modified patterns that the plaintiff licensed or sold out the use of his trade-mark, particularly in a contest with third parties, the Peckhams themselves disavowing all right, claim, or interest in the trade-mark, either as originators or purchasers.

4. That the plaintiff's use of the trade-mark claimed by him has been continuous and uninterrupted since the first adoption by him to the present time.

The fact that parties in Cincinnati or elsewhere manufactured "Charter Oak" stoves and sent them into the market to compete with the plaintiff's manufactures, in no way aids the defence, unless it appears that the plaintiff assented to or acquiesced in such infringements upon his rights; and, as already indicated, there is nothing in the case to establish a dedication or abandon-

ment to the public on the part of the plaintiff of his supposed rights of property in the alleged trade-mark. There is no testimony having that tendency, except the transaction with the Peckhams, and that is insufficient. In *Gillott v. Esterbrook*, 47 Barb. 455, it appeared that an imitation of the plaintiffs' mark had been in use for many years, and that for twenty years he had issued printed "cautions" to the public on the subject, implying knowledge on his part of such use, but that was held no acquiescence, although the plaintiffs had neglected to institute prosecutions.

The depredations of others on plaintiff's rights furnish no excuse to the defendants for similar acts on their part. It is rather an aggravation to the plaintiff that others have also injured him. And courts have not shown any disposition to encourage that line of defence. WOODBURY, J., in *Taylor v. Carpenter*, 2 Wood. & Minot 8, held this language: "There is something abhorrent in allowing such a defence to a wrong which consists in counterfeiting others' marks and stamps, defrauding others of what had been gained by their industry and skill, and robbing them of the fruit of their good name, merely because they have shown forbearance and kindness." See observations of STORY, J., same case, 3 Story's R. 464.

After this suit was commenced, Rosenbaum & Co., who seem to be the real parties defending against the action, made an attempt to appropriate the disputed trade-mark to their own use, in due form of law, by filing in the office of the recorder of deeds in the county of St. Louis a written claim thereto, under the Act of March 1866, Gen. Stat. 912. A certified copy of the paper so filed, declaring that said Rosenbaum & Co. had adopted "Charter Oak" as their trade-mark for stoves manufactured by them was given in evidence, and relied upon as showing their title to the trade-mark as against Filley, who had never filed any such document. If this proceeding can be made available for the purpose intended, it may be regarded as an entirely new and improved method of disposing of trade-mark cases, and of appropriating the property of others, the subject of such suits, without risk or inconvenience, and at very slight cost.

A glance at the statute, however, shows that it was intended for no such purpose. It was not designed in the slightest particular to weaken or abridge any existing rights, or any future right to a trade-mark which might be acquired in the usual way,

or to legalize in any form or measure piracy in trade-marks. Property in a trade-mark is acquired at common law only by appropriation and use, and then only of such names, words, and devices as may be held to be adapted to point out the true source and origin of the goods to which such marks are applied. The statute widens the range of selection, and authorizes the mechanic or manufacturer to adopt any name or device he pleases, and to foreclose any controversy on the subject by writing out and filing with the recorder, as the law provides, an accurate description of the name, device, &c., that may have been chosen. But such paper is to be filed in the county where the goods, &c., are to be manufactured or prepared. It is not perceived how this can be made to apply to Rosenbaum & Co.'s stoves, which are manufactured in another state. The statute has no application to the facts of the present litigation. Nor will any fair construction of it warrant the appropriation by one party of an existing trade-mark, the title and ownership of which is in another party.

- But it is objected that the words "Charter Oak," with the accompanying device, lack the requisite ingredients or characteristics of a trade-mark, and therefore it is insisted that the plaintiff could acquire no exclusive right to their use for that purpose.

The books are full of authority establishing the proposition that any contrivance, design, device, name, symbol, or other thing, may be employed as a trade-mark which is adapted to accomplish the object proposed by it; that is, to point out the true source and origin of the goods to which said mark is applied; or even to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers. The mark, however, must possess the requisite characteristics, pointing out the source and origin of the goods, and not be merely descriptive of the style, quality, or character of the goods themselves. Thus it has repeatedly been held that where the name or device employed had, from use or other cause, come to be descriptive of the goods manufactured or sold, their quality and use, such name or device was ineffectual and could not be upheld as a trade-mark. It was so as to the letters "A. C. A.," in the leading and famous case of *The Amoskeag Manufacturing Co. v. Spear*, 2 Sandf. S. C. R. 599, as also in *Stokes v. Landgraff*, 17 Barb. 608, and in various other cases cited by the defendants. But these authorities have no application to the mark claimed by the plaintiff. For the

name "Charter Oak," with the combined device, in no possible view or application of them, are either descriptions or suggestive of the style, character, or qualities of a cast-iron cooking-stove. In their natural significance, import, or symbolism, or in the use made of them prior to the plaintiff's appropriation of them as a trade-mark, they were as far removed as can well be imagined from conveying any such application or meaning. And that constitutes one of their virtues as a trade-mark: *Petridge v. Merchant*, 4 Abb. Prac. R. 158; 6 Beav. 66; 4 McLean 516.

The general rule respecting the characteristics of trade-marks has already been given. The following names and designations, among many others, have been held to come within that rule. As pointing to a hotel, "Irving House," (3 Sand. S. C. 726); "Revere House," (7 Cush. 322). As pointing to a manufacturer or dealer, "Cocoaine," (9 Bosw. 192); "Howe," (50 Barb. 236); "Akron," the name of a town, (19 Barb. 599); "London Conveyance Company," (2 Keene 220); "303," the designation of a particular pen, (47 Barb. 471); "Bell's Life," the name of a newspaper, (22 Law Rep. 428); "Roger Williams Long Cloth," (6 R. I. 434); "Day & Martin," (7 Beavan 89).

The name and device selected by the plaintiff were adopted to point out the true source and origin of the stoves to which he applied them, and were therefore possessed of the requisite characteristics of a trade-mark. By the adoption and use of that mark he acquired a property interest therein which the courts will protect. Have the defendants invaded the rights of the plaintiff in this behalf?

The defendants accumulated in the St. Louis market a quantity of the Rosenbaum & Co. stoves, with the name "Charter Oak" upon them, which they held for sale as "Charter Oak" stoves. They were aware of the plaintiff's proprietorship of the "Charter Oak" trade-mark, and were proceeding to sell in defiance of plaintiff's rights.

In this condition of things the present suit was instituted and an injunction granted restraining the defendants from the proposed sale. The only question raised on this branch of the case is, whether the use of the name "Charter Oak," separated from the other parts of the plaintiff's mark, amounted to an infringement of his rights, assuming his ownership of the name as a trade-mark in combination with the device of oak leaves.



On this point there can be no reasonable doubt. The plaintiff's stoves were not conspicuously known by the particular device which surrounded the name upon them, but by the name itself. That was the conspicuous element in the mark. By that name the stove was bought and sold, and known in the Western and Southern markets. It was the prominent essential and vital feature of the plaintiff's trade-mark. That name the defendants and their principals appropriated bodily, and applied it to their stoves, and sought to acquire the sole and exclusive use of it by filing their claim in the recorder's office under the statute. That shows their appreciation of the value of the name, and of their purpose not only to use it themselves, but to exclude the originator of it from its use. Granting Filley's exclusive right, there can be no doubt that the things done and purposed by the defendants were of injurious tendency, and that the name "Charter Oak," as employed by them, was eminently calculated to mislead buyers as to the true source and origin of the stove to which the defendants applied that name. If the name as used by them was calculated to mislead, the intention to deceive is to be inferred therefrom: *Fetridge v. Merchant*, 4 Abb. Pr. R. 159; 4 Mann. & Gr. 385.

The imitation of an original trade-mark need not be exact or perfect. It may be limited and partial; nor is it requisite that the whole should be pirated. Nor is it necessary to show that any one has, in fact, been deceived; or that the party complained of made the goods: 2 Sand. S. C. 607; 25 Barb. 79; 23 Eng. L. & E. 53-4; 2 Sand. Ch. 597. Nor is it necessary to prove intentional fraud. "If the court sees that complainant's trade-marks are simulated in such a manner as probably to deceive customers or patrons of his trade or business, the piracy should be checked at once by injunction:" 4 McLean 519; 2 Barb. Ch. 103.

The result is, that the judgment of the Circuit Court must be affirmed.

The other judges concur.

The right of a party to protection in the use of his trade-mark, meaning thereby any "names, signs, marks, brands, labels, words, or devices of any kind, which can be advantageously used to designate his goods," though of com-

paratively recent origin in its fulness and perfection, was foreshadowed as early as the time of the Year Books, in the case of *Sothern v. How*, 2 Croke 468.

Although the recognition of this right by courts of equity, and its consequent

protection by injunction, was at a much later period, it is now so firmly established by the highest authority as a proper subject for the exercise of the restraining control of that court, whenever violated, that it is no longer an open question: *Amoskeag Manufacturing Co. v. Spear*, 2 Sandf. S. C. 606.

A trade-mark may, in its elementary signification, be applicable to a great variety of forms, marks, or symbols designating the origin or ownership of the thing to which it is applied.

For instance, the title "Irving House" having been used by a person for three years only, as a name of his hotel, an injunction was granted against a party setting up a hotel and calling it by the same name: *Howard v. Henriques*, 3 Sandf. S. C. 726.

The same principle was held in respect to the name "Revere House" when applied to coaches: *Marsh v. Billings*, 7 Cush. 322.

"Cocaine," as a name of hair oil, held to be an infringement on "Cocaine;" and this, too, though the ingredients of the oil were open to the use of all: *Burnett v. Phalon*, 9 Bosw. 192.

Held by the court that A. B. Howe had such an exclusive right to the use of the word "Howe" as a trade-mark, placed by him upon a sewing machine sold by him under a license from E. Howe, Jr., the patentee, that E. Howe, Jr., could be restrained from using it as such: *Howe v. Howe Machine Co.*, 50 Barb. 236.

Parties making lime at the town of Akron were held entitled to use the word "Akron" as a trade-mark, and an injunction was granted against the defendants who marked their lime with this word: *Newman v. Alvord*, 49 Barb. 588.

The number "303" was held to be a proper subject for a trade-mark of pens, and its use was restrained by injunction: *Gillott v. Esterbrook*, 47 Barb. 455.

The term "London Conveyance

Co.," as the name of an omnibus company, was upheld as a trade-mark in *Knott v. Morgan*, 2 Keene 220.

"Sykes' Patent" as a trade-mark for shot-bolts was sustained by injunction against a party of the same name, and that, too, though the party had a perfect right to make the identical article, there being in fact no patent: *Sykes v. Sykes*, 3 Barn. & Cress. 543.

"Penny Bell's Life," the name of a newspaper, was restrained as an infringement of "Bell's Life," in *Clement v. Maddick*, 22 Law Rep. 428.

"H. H. 6," as a trade-mark of ploughs, was upheld: *Remson v. Bental*, 3 Law Jour. N. S. 161.

"Seixo," as a brand for wine, was sustained: *Seixo v. Provezende*, 1 Chan. App. Cas. 184.

"Roger Williams Long Cloth" was upheld, and those using "Roger Williams" as a designation of cotton cloth were restrained: *Barrows v. Knight*, 6 R. I. 434.

"Anatolia," as a brand for liquorice, was sustained in *McAndrews v. Bassett*, 10 Jurist N. S. 550, though it was argued that the word being common to all there could be no property in it; Lord Westbury saying: "property in a word for all purposes cannot exist, but property in a word as applied by way of stamp upon a stick of liquorice does exist the moment the liquorice gets into the market so stamped."

In *Pidding v. Howe*, 8 Simons 477, the name used was "Howqua Mixture;" and the court said: "The defendant, finding that the plaintiff's mixture was in considerable demand, had recently begun to sell a mixture of his own under the same designation. I apprehend that *prima facie* the defendant was not at liberty to do that."

In *Goutt v. Aleploglu*, 6 Beavan 69, the court restrained the defendant from using the Turkish word "Peasendede," meaning "warranted or approved," on

watches made by him, the plaintiff having long used such word as a mark for his watches.

In *Croft v. Day*, 7 Beavan 89, "Day & Martin," as a trade-mark for blacking, was sustained against a firm, the real name of which was Day & Martin.

"Bismarck" as name of paper collars, was upheld in *Messerole v. Tynberg*, 4 Abb. Pr. N. S. 414, the court remarking: "There is no reason for making any distinction between a common word or term used for an original purpose, which has accomplished its object, and a new design adopted by a manufacturer."

In *Farina v. Silverlock*, 39 Eng. Law & Eq. 517, an injunction was granted against the engraver who made simulated labels to sell to third parties.

There seems to be no more restriction against the choice of a name for a trade-mark than the choice of a symbol. It is sufficient that the name in its application to the goods be so far original and peculiar as to be capable of distinguishing when known in the market one manufacturer's goods from those of another: *Ainsworth v. Walsley*, 1 Law Rep. Eq. Cas. 252; *Amoskeag Manufacturing Co. v. Spear*, 2 Sandf. S. C. 605; *Newman v. Alvord*, 49 Barb. 592; *Williams v. Johnson*, 2 Bosw. 1.

A party being fully possessed of this right of property in his trade-mark, will not be held to have waived such right by reason of his neglect to restrain others from its use. "It is no excuse that others have used or are using such trade-mark:" *Taylor v. Carpenter*, 3 Story 462; *Coates v. Holbrook*, 2 Sandf. Ch. 596; *Taylor v. Carpenter*, 2 Wood. & Min. 8.

Where the use by others is with the knowledge of the original owner of the mark, his consent, if implied at all in the knowledge of such use, can be revoked at any time: *Gillott v. Esterbrook*, 47 Barb. 471.

In relation to what constitutes an in-

fringement, it is settled that "The whole trade-mark need not be pirated:" *Ibid.* 469.

"An injunction ought to issue whenever the design, either apparent or proved, is to impose on the public, and the imitation is such that the success of the design is a probable or possible consequence: *Amoskeag Manufacturing Co. v. Spear*, 2 Sandf. S. C. 607.

"If the wholesale buyer, who is most conversant with the marks, is not misled, but the small retailer or the consumer is, the right of action must exist:" *Clark v. Clark*, 25 Barb. 79.

"It is not necessary that any proof should be made of any one having been deceived, but the court will examine the two things, and see if they are not calculated to deceive." When there is a strong resemblance the court will presume it is not fortuitous, but that it was intentional with a view to mislead purchasers: *Eddleston v. Vick*, 23 Eng. Law & Eq. 58-4.

Nor is it necessary that the one infringing upon the trade-mark should be shown to offer the articles as those of the plaintiff's manufacture, for even where the contrary appeared, an injunction was ordered in the case of *Sykes v. Sykes*, 3 Barn. & Cress. 543.

And even where the defendant expressly informed the purchaser that the trade-mark placed on the goods was an imitation of the plaintiff's mark, an injunction was granted, on the ground that succeeding dealers might not make a similar disclosure: *Coates v. Holbrook*, 3 Sandf. Ch. 586.

It is not necessary that the defendants should be the manufacturers of the goods. They can be enjoined although only commission merchants, selling in the strict line of their business: *Ibid.*

It is not necessary to prove intentional fraud on the part of defendant to warrant equitable relief. It is the probability of deception which justifies the

remedy by injunction: *Coffeen v. Brunton*, 4 McLean 519; *Dale v. Smithson*, 12 Abb. Pr. 238.

In the collection of the foregoing

cases upon the law of trade-marks, we acknowledge our indebtedness to the able brief of S. S. Boyd, counsel in the case to which this note is appended.

A. M.

### *Supreme Court of Pennsylvania.*

#### HAMMETT v. THE CITY OF PHILADELPHIA.

It is settled in Pennsylvania that the legislature may confer upon municipal corporations the power to assess the cost of local improvements upon the property benefited.

But such local assessments can only be imposed to pay for local improvements, clearly conferring special benefits on the properties assessed, and to the extent of those benefits. They cannot be imposed when the improvement is either expressed or appears to be for general public benefit.

The paving of a street, changing a road into a street, and bringing the land fronting on it into the market as building lots, is a local improvement, with special benefits to the land fronting on it, and the cost of such paving may be assessed on the property benefited.

But when a street is once opened and paved, and has thus become a part of the public highways of the city, the *repaving* of it, either with a new and different pavement, or by repairing the old one, is a part of the general duty of the corporation, and cannot be paid for by assessments on the adjoining properties.

WRIT of error to the District Court of the city of Philadelphia.

The action was on a municipal claim filed in the following form.

The CITY OF PHILADELPHIA to the use  
of CHARLES E. JENKINS and JONATHAN  
TAYLOR,

v.

BARNABAS HAMMETT, owner or reputed  
owner.

*In the District Court of the  
City and County of Philadel-  
phia, of March Term 1868.*

NUMBER 31.

The City of Philadelphia, to the use of Charles E. Jenkins and Jonathan Taylor, files this claim against Barnabas Hammett, owner or reputed owner, of all that certain lot or piece of ground, with the buildings and improvements thereon erected, situate at the south-west corner of Broad and Poplar streets, for 1007  $\frac{1}{8}$  square yards of Nicolson pavement, done and laid in front of the premises above described, in Broad street, on the 27th day of November 1867, pursuant to the authority of "An Act supplementary to an Act to incorporate the City of Philadelphia, authorizing the improvement of Broad street in said City," approved March 23d 1866, and of "An Ordinance authorizing the paving of a portion of Broad street with Nicolson Pavement," approved July 5th 1867, at the rate of four dollars per

square yard, or the sum of \$4029.04, and for five per cent. on said sum, or the sum of \$201.45, as imposed by "A further Supplement to an Act consolidating the City of Philadelphia, *et cetera*, regulating the filing and collection of Municipal Claims," approved March 23d 1866; for which sum of \$4230.49, with interest thereon, a lien is claimed against the above described premises, pursuant to divers statutes enacted and provided.

JAMES LYND, Solicitor of the City of Philadelphia.

DAVID W. SELLERS, Attorney for Jenkins and Taylor.

March 26th 1868.

The Act of March 23d 1866, Pamph. L. 299, in sect. 1 thus enacted:—

"That the city of Philadelphia be and it is hereby authorized and empowered and required to occupy Broad street, in the city of Philadelphia, for its entire length, as the same is now opened or may hereafter be opened, and from curb to curb thereof, except as hereinafter provided, for the uses and purposes of a public drive, carriageway, street, or avenue, and to improve the said street, or portions thereof, from time to time, and in whole or in part, with such mode of pavement, paving, macadamizing, gravelling, or other roadway, as may, in the judgment of the Select and Common Councils of said city, be best adapted to and for the uses and purposes aforesaid; and for that purpose the said Councils shall have, and are hereby authorized to enact such ordinances or resolutions, with such conditions or stipulations as may require the cost of said improvements to be paid for by the owners of property abutting upon said street."

Under the authority of this act the city of Philadelphia contracted with the licensees of the patentee of the Nicolson pavement to pave a portion of Broad street with that pavement, the cost thereof to be paid by the owners. The licensees were authorized to use the name of the city to recover the cost.

A *scire facias* was issued upon the above claim, and the owner of the ground filed an affidavit of defence as follows:—

"Barnabas Hammett, defendant above named, being duly sworn, deposes and says: That there is a defence to the plaintiff's claim, as follows:

"Broad street, at the part described in the claim, in front of the premises owned by this deponent, was, at the time of making the contract for paving the same by Jenkins & Taylor, and of doing the work thereunder for which the claim is filed, well paved with cobble stones in the style universally adopted for years past in this city for the best paved avenues, and such pavement was then in good order and condition, with every probability of it so continuing: it had been laid by the city and her authorized

agents, of their own option, at the time they saw fit, and in such mode and with such material as they chose to select, irrespective of any wish of the then owner of the premises, and the entire expenses thereof both of the materials for the pavement and the laying of the same, were paid by the then owner of the said real estate to the city and her agents at their request, and in obedience to the laws authorizing the pavement of the streets. Afterwards and while (as above stated) the pavement laid by the city at the expense of the owner of the premises was in good order, the city of Philadelphia entered into a contract with said Jenkins & Taylor, under which and not otherwise the plaintiffs did the work for the price of which the said claim is filed and this suit is brought.

"Deponent is advised that the said Act of Assembly is unconstitutional and therefore void, in this: that it delegates to the councils of the city power to impose upon certain persons owners of certain properties facing a public avenue, the entire burden of a general unrestricted work to be undertaken, in the words of the preamble, 'for the uses and purposes of the public and the benefits and advantages which will enure to them,' when those properties had already been subjected to the contribution for paving usual to all other city properties."

The District Court, upon rule, entered judgment for want of a sufficient affidavit of defence, and to that judgment this writ of error was taken.

*William A. Porter* and *Constant Guillou*, Esqs., for plaintiff in error, contended that no case in Pennsylvania had recognised any power in the legislature to re-pave at the expense of the ground which had already borne the expense of paving.

*William McMichael* and *David W. Sellers*, Esqs., for defendants in error, contended that acts imposing the cost of opening and paving highways, on owners of ground fronting thereon, are within the power of the legislature; and cited most of the cases quoted in the opinion of the court, and the dissenting opinion of *Read, J.*

They further contended that if there was no constitutional limit on the power, the whole subject-matter was one of public policy for the legislature, and not for the courts; and that if the

power was conceded, the reason for its exercise was not reviewable anywhere. That in a former case this court had declined to allow a similar averment that municipal work was wholly for public uses to defeat the charge against the individual: *City v. Tryon*, 11 Casey 401.

The opinion of the court was delivered by

SHARSWOOD, J.—It may be considered as a point fully settled and at rest in this state, that the legislature have the constitutional right to confer upon municipal corporations the power of assessing the cost of local improvements upon the properties benefited. It is a species of taxation; not the taking of private property by virtue of eminent domain. It was decided in *McMasters v. The Commonwealth*, 3 Watts 292, that in the opening of streets in a town or city, the damage occasioned to some of the lots might be apportioned and assessed upon others in the neighborhood improved in value thereby. It is there assumed, as a well-settled principle, employing the words of Chancellor WALWORTH in *Livingston v. New York*, 8 Wend. 85, that when any particular county, district, or neighborhood is exclusively benefited by a public improvement, the inhabitants of that district may be taxed for the whole expense of the improvement and in proportion to the supposed benefit received by each. The conclusion seemed logically to follow; for, if a county, district, or town can be assessed for a public improvement on the ground that they are particularly benefited, there can be no constitutional reason to exempt an individual from assessment on the same principle. It becomes a mere question of expediency, of which the legislature are the competent and exclusive judges, and not of right. This doctrine is again asserted in *Fenlon's Petition*, 7 Barr 173; and in the subsequent case of the *Extension of Hancock Street*, 6 Harris 26, the constitutionality of such an exercise of the taxing power was declared to be no longer an open question.

On the same principle the validity of municipal claims assessing on the lots fronting upon streets their due share of the cost of grading, curbing, paving, building sewers and culverts, and laying water-pipes, in proportion to their respective fronts, has been repeatedly recognised, and the liens for such assessments enforced: *Pennock v. Hoover*, 5 Rawle 291; *The Northern Liberties v. St. John's Church*, 1 Harris 104; *The City v. Wistar*, 11 Casey 427;

*The Commonwealth v. Woods*, 8 Wright 113; *Magee v. The Commonwealth*, 10 Id. 358; *Wray v. The Mayor, &c., of Pittsburgh*, Id. 265.

These cases all fall strictly within the rule as originally enunciated—local taxation for local purposes—or, as it has been elsewhere expressed, taxation on the benefits conferred, and not beyond the extent of those benefits. There is, indeed, no clause in the Constitution of Pennsylvania which restricts the power of taxation in the legislature as is to be found in the constitutions of many of our sister states. Yet it must be confessed that there are necessary limits to it in the very nature of the subject. It is very clear that the taxing power cannot be used in violation of provisions in the Bill of Rights, everything in which is “excepted out of the general powers of government, and shall for ever remain inviolate.” There is no case to be found in this state, nor, as I believe, after a very thorough research, in any other—with limitations in the constitution or without them—in which it has been held that a legislature, by virtue merely of its general powers, can levy, or authorize a municipality to levy, a local tax for general purposes. I shall have a word to say presently of two or three of our cases which are supposed to countenance such an idea. It may be shown logically, and that without difficulty, that such a doctrine lands us in this absurd proposition: That the whole expenses of government, general and local, may be laid upon the shoulders of one man, if one could be found able to bear such a burden. A conclusion so monstrous shows that the premises must be wrong. Such a measure would not be taxation, but confiscation. That can only be the consequence of attainder for crime, and not even then to its full extent, for there can be no forfeiture of estate to the Commonwealth except during the life of the offender. It is well remarked by Chief Justice ROBERTSON, of Kentucky, under a constitution without restraint on the legislative power of taxation: “An exact equalization of the burden of taxation is unattainable and Utopian. But, still, there are well-defined limits within which the practical equality of the constitution may be preserved, and which, therefore, should be deemed impassable barriers to legislative power. \* \* \* \* \* The legislature, in the plenitude of its taxing power, cannot have constitutional authority to exact from one citizen, or even one county, the entire revenue of the whole Commonwealth. Such an exac-



tion, by whatever name the legislature might choose to call it, would not be a tax, but would, undoubtedly, be the taking of private property for public use, and which could not be done constitutionally without the consent of the owner or owners, and without retribution of the value in money:" *Lexington v. McQuil-lan's Heirs*, 9 Dana 513. "A legislative act," says Chief Justice BEASLEY, of New Jersey, "authorizing the building of a public bridge, and directing the expenses to be assessed on A., B., and C., such persons not being in any way peculiarly benefited by such structure, would not be an act of taxation, but a condemnation of so much of the money of the person designated to a public use:" *The Tidewater Co. v. Carter*, 3 C. E. Green 518. "The whole of a public burden," says Chief Justice BLACK, "cannot be thrown on a single individual under pretence of taxing him, nor can one county be taxed to pay the debt of another, nor one portion of the state to pay the debts of the whole state. These things are not excepted from the powers of the legislature, because they did not pass to the Assembly by the general grant of legislative power. A prohibition was not necessary. An Act of Assembly commanding or authorizing them to be done, would not be a law, but an attempt to pronounce a judicial sentence, order, or decree:" *Sharpless v. The Mayor of Philadelphia*, 9 Harris 168. It is said that the line of distinction between the right of taxation and the right of eminent domain is clear and well defined. Taxation exacts money or services from individuals, as and for their respective shares of contribution to any public burden. Private property, taken for public use by right of eminent domain, is taken not as the owner's share or contribution to a public burden, but as so much beyond his share: *The People ex rel. Griffin v. Brooklyn*, 4 Comst. 419. It has been said by Judge FIELD, of California, now on the bench of the Supreme Court of the United States, that "money is not that species of property which the sovereign authority can authorize to be taken in the exercise of its right of eminent domain. That right can be exercised only with reference to other property than money, for the property taken is to be the subject of compensation in money itself; and the general doctrine of the authorities of the present day is, that the compensation must be made, or a fund provided for it, in advance:" *Burnett v. Sacramento*, 12 California 76. I am not able, and do not feel disposed, to enter the lists upon such a ques-

tion, but it does seem to me that there may be occasions in which money may be taken by the state in the exercise of its transcendental right of eminent domain. Such would be the case of a pressing and immediate necessity; as in the event of invasion by a public enemy, or some great calamity, as famine or pestilence, contributions could be levied on banks, corporations, or individuals. The obligation of compensation is not immediate. It is required only that provision should be made for compensation in the future. Judge RUGGLES confines the right to exact money by virtue of the eminent domain, to the case where it is for the use of the state at large in time of war: *The People ex rel. Griffin v. Brooklyn*, 4 Comst. 419. I cannot see that there is any such necessary limitation. The public necessity which gives rise to it, prevents its being restrained by any limitations as to either subject or occasion. In truth it matters not whether an assessment upon an individual or a class of individuals for a general, and not a mere local purpose, be regarded as an act of confiscation—a judicial sentence or rescript, or a taking of private property for public use without compensation—in any aspect, it transcends the power of the legislature, and is void. I regard it as a forced contribution. If the sovereign breaks open the strong-box of an individual or corporation and takes out money, or, if not being paid on demand, he seizes and sells the lands or goods of the subject, it looks to me very much like a direct taking of private property for public use. It certainly cannot alter the case to call it taxation. Whenever a local assessment upon an individual is not grounded upon, and measured by, the extent of his particular benefit, it is, *pro tanto*, a taking of his private property for public use without any provision for compensation. That clause in the Declaration of Rights is, indeed, the sheet-anchor of private property, the security of which against the government, as well as all others, is intended in the 1st section of the 9th article: "All men have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness." The dollar which a poor man has earned by the sweat of his brow—the fortune which a rich man has inherited from his ancestors—stand on the same rock, and are surrounded and protected by the same barrier. Invested for comfort and assurance against want in sickness

or old age, or cherished as a provision for widow or orphan after he has gone, it is a right which it is despotism to take from him, except for the necessary purposes of government by equal and just taxation. It is none the less so if it be the act of the hydra-headed monster, a numerical majority, or that of a single autocrat. It is the solemn duty of the judiciary, under our Constitution, to guard and protect this right of property, as well from indirect attacks under any specious pretext, as from open and palpable invasion. "There being," says Chief Justice MARSHALL, of Kentucky, "no express constitutional declaration or prohibition directly applicable to the powers or subject of taxation, and none which, in terms, secures equality or uniformity in the distribution of public burthens, either general or local, there is no clause to which the citizen can, with certainty, appeal for protection against an oppressive and ruinous discrimination, under color of the taxing power, unless it be that which prohibits the taking of private property for public use without compensation. \* \* \* \* This is the great conservative principle of the Constitution, by which the rights of private property are to be preserved from violation under public authority; and we should feel bound to give it, as has heretofore been done, a liberal construction for the attainment of so important and valuable an object:" *Cheany v. Houser*, 9 B. Monroe 341. .

It may be said that *Sharpless v. The Mayor of Philadelphia*, 9 Harris 147, and *Kirby v. Shaw*, 7 Id. 258, are irreconcilable with the reasoning employed in this opinion. As to the first of these cases it is now practically unimportant, because it has been in effect reversed by the 7th section of the 1st amendment of the Constitution of 1857. It has been seen that it recognises that there are limits to the taxing power such as are here contended for; and the only doubt can be whether the rule was rightly applied. As to *Kirby v. Shaw*, although a case on the very verge of the principle which is established—local taxation for local purposes—and there are some generalizations in the judgment as pronounced by Chief Justice GIBSON by far too broad, yet ultimately it is put on the ground of peculiar benefit. "The advantages of a county town," says he, "are too well appreciated not to make every village use all its exertions to have a court-house provided for its benefit and convenience. Without a court-house to replace the burnt one, Towanda could not have remained the

seat of justice; and as its inhabitants profited by, not only the disbursements of the tax among them, but a permanent increase of their business and an appreciation of their property, they were morally bound to contribution. It was for the legislature to fix the proportion, and we have neither a right nor a disposition to question their justice." Here, too, the only real question would seem to be as to the application of the principle. *Kirby v. Shaw* has been since followed by this court in the case of the South Street Bridge, *The City of Philadelphia v. Field et al.* (July 2d 1868), a judgment in which the Chief Justice and myself were unable to concur.

Assessments on property peculiarly benefited by local improvements, and in consideration of such benefit, are constitutional—thus far have the judicial decisions in this and other states gone, and no further. A few only of the leading cases need be cited. *In the Matter of Canal Street*, 11 Wend. 155; *Hill v. Higdon*, 5 Ohio (N. S.) 243; *Stryker v. Kelly*, 7 Hill 9, 23; s. c., 2 Denio 323; *Goddard, Petitioner*, 16 Pick. 504; *Lowell v. Headley*, 8 Metcalf 180; *Garrett v. City of St. Louis*, 55 Missouri 505; *Anderson v. Kern*, Draining, 14 Indiana 199; *Sanborn v. Rice County*, 9 Minn. 273; *Weeks v. City of Milwaukee*, 10 Wisc. 242; *Creighton v. Mancon*, 27 Cal. 613; *Tide Water Co. v. Coster*, 3 C. E. Green 54, 518. Undoubtedly, the power of taxation is not to be rigidly scanned. Every presumption is to be made in its favor. If the case is within the principle, the proportion of contribution and other details are within the discretion of the taxing power. We may say with Judge PECK of Ohio: "It is quite true that the right to impose such special taxes is based upon a presumed equivalent, but it by no means follows that there must be in fact such full equivalent in every instance, or that its absence will render the assessment invalid. The rule of apportionment, whether by the front foot or a percentage upon the assessed valuation, must be uniform, affecting all the owners and all the property abutting on the street alike:" *Northern Indiana Railroad Co. v. Connelly*, 10 Ohio (N. S.) 159. Or, as in our own case of *Commonwealth v. Woods*, 8 Wright 113, where it was held, in an instance unquestionably within the general principle, that the assessment when made in pursuance of law is final and conclusive, and cannot again be reviewed by any other tribunal. On the examination of the cases I have found two in which it was.

attempted, though fortunately without success, to make the owners personally liable for assessments beyond the value of their lots, cases which show how dangerous and liable to abuse is this power of special taxation with all the guards which can be thrown around it. *In the Matter of Canal Street*, 11 Wend. 155, the court say: "In this case it is assumed and not contradicted that many individuals will be ruined if compelled to pay the assessments for which they are liable." In *Creighton v. Manson*, 27 California 613, the lot in question, before the grading of the street, for which the assessment was claimed, was appraised for revenue purposes at \$1400. It was rendered worthless by the grading; yet the attempt was made to make the owners personally liable for its assessment, which was \$1989.54.

It remains to apply these principles to the case presented to us upon this record. The original paving of a street brings the property bounding upon it into the market as building lots. Before that, it is a road, not a street. It is, therefore, a local improvement, with benefits almost exclusively peculiar to the adjoining properties. Such a case is clearly within the principle of assessing the cost on the lots lying upon it. Perhaps no fairer rule can be adopted than the proportion of feet front, although there must be some inequalities if the lots differ in situation and depth. Appraising their market values, and fixing the proportion according to these, is a plan open to favoritism or corruption, and other objections. No system of taxation which the wit of man ever devised has been found perfectly equal. But when a street is once opened and paved, thus assimilated with the rest of the city and made a part of it, all the particular benefits to the locality derived from the improvements have been received and enjoyed. Repairing streets is as much a part of the ordinary duties of the municipality—for the general good—as cleaning, watching, and lighting. It would lead to monstrous injustice and inequality should such general expenses be provided for by local assessments.

This case indeed is still clearer than that which I have put of a simple repairing. Broad street, in front of the lot of the plaintiff in error, was paved only a few years ago in the ordinary way in which all the other streets of the city have been paved—with cobble-stones—and whatever advantage there was in his owning property on so wide and handsome a street was paid for by him in

the increased cost assessed upon him for the paving. Without any pretence that it has been worn out and required to be replaced by another, it was torn up, and a new and very expensive wooden pavement substituted. The plaintiff in error did not remain silent. He protested and remonstrated, and filed a bill in equity to restrain the work before it began. The city and their contractors can plead no equity against him. It is said that it was all for his interest. But whether he was mistaken or not as to his own interest, he was the judge of that, not this court. The case is not to be decided upon any particular results in this instance, but on general principles which can work with safety and advantage to the public in all other cases. Mr. Hammett may have been specially benefited; though we have no evidence of that on this record, and we have no right to consider evidence derived from any other source, but the next experiment may be unsuccessful and ruinous. It was well said by the court in *The People ex rel. Post v. Brooklyn*, 6 Barb. 209: "If it be true that certain individuals are so greatly benefited, they will be quite as apt to discover where their interests lie as the Common Council; and if their lands are to be so much enhanced in value, they will, by their contributions, enable the authorities to perform the work at a very trifling expense to the city at large." The object of this improvement is not to bring or keep Broad street as all the other streets within the built-up portions of the city are kept, for the advantage and comfort of those who live upon it, and for ordinary business and travel, but to make a great public drive—a pleasure-ground—along which elegant equipages may disport of an afternoon. We need look no further than the preamble of the act authorizing the improvement of Broad street, passed March 23d 1866, Pamph. L. 299, for evidence that it is for the general public good, not for mere peculiar local benefit. It states it to be "for the uses and purposes of the public, and the benefits and advantages which will enure to them by making and for ever maintaining Broad street, in the city of Philadelphia, for its entire length as the same is now opened, or may hereafter be opened, the principal avenue of the said city." Thus we have special taxation authorized for an object, avowed on the face of the act to be general and not local, which relieves the case of all difficulty as to the fact. We have only to advance the project a few steps further to see how preposterous is the idea of paying for such an

improvement by assessments. In the natural course of things, we may expect that it will be proposed to adorn this principal avenue with monuments, statuary, and fountains. Will their cost be provided for in the same way? How much does this plan differ from a proposition to erect new public buildings on Independence Square, and assess the cost on the lots situated on the neighboring streets? On the same principle, lots on the public squares could be assessed to pay for any new project to beautify and adorn them, no matter how great the expense. It might be argued with equal plausibility that their value was increased by the improvement. We must say at some time to this tide of special taxation, Thus far shalt thou go, and no further. To our own decisions, as far as they have gone, we mean to adhere, but we are now asked to take a step much in advance of them. This we would not be justified, by the principles of the Constitution, in doing.

Local assessments can only be constitutional when imposed to pay for local improvements, clearly conferring special benefits on the properties assessed, and to the extent of those benefits. They cannot be so imposed when the improvement is either expressed or appears to be for general public benefit.

There have been several other points raised and discussed on this record, but we are not obliged to consider them; and as the conclusion at which we have arrived that the Act of Assembly of March 23d 1866, so far as it authorizes the councils of the city of Philadelphia "to enact such ordinances or resolutions with such conditions or stipulations as may require the cost of said improvements to be paid for by the owners of property abutting on said street," is unconstitutional and void, disposes of the whole case, it is unnecessary to discuss any other.

Judgment reversed.

READ, J., dissented.<sup>1</sup>

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<sup>1</sup> We regret that its length prevents our printing the elaborate and able dissenting opinion of READ, J., containing a very full and learned review of the subject of legislative power over local assessments both in England and in Pennsylvania as a colony and as a state.

*United States Circuit Court. District of Virginia.*

## MATTER OF J. D. ALEXANDER, A BANKRUPT.

The *appellate* jurisdiction, properly so called, of the Circuit Court in bankruptcy matters is limited to controversies between assignees and the claimants of adverse interests, and between assignees and creditor-claimants respecting the allowance of claims.

The *supervisory* jurisdiction of the Circuit Court includes all decisions of the District Court, or the district judge at chambers, which cannot be reviewed by appeal or writ of error under the appellate jurisdiction given by the 8th section.

An appeal must be taken in the time and manner prescribed by the act. The regulations as to appeals are regulations of jurisdiction, and cannot be enlarged or restricted by the Circuit or District Courts.

THIS was a petition by B. C. Bagley and John Alexander for the revision of an order of the District Court. It appeared that among the assets of the bankrupt was a tract of land, encumbered by a deed of trust, executed by him on the 24th of December 1864, in favor of William D. Miller, to secure the payment of three bonds, each for \$17,000, payable in four, eight, and twelve years from date respectively; that the petitioner Alexander was tenant of the tract under the assignees, claiming a term, which would not expire until January 1st 1870; and that the petitioner Bagley held a judgment which was a lien on the real estate of the bankrupt, and was claimed to be the next lien after the deed of trust.

On the 16th of March 1869, the District Court made two orders, one directing the assignees to sell the land, and the other directing that Miller might become the purchaser, and that the assignees should receive the amount of his bid in the trust bonds at par. The petitioners, as soon as these orders came to their knowledge, prayed an appeal in the name and with the approval of the assignees, and immediately notified Miller and the clerk of the District Court of their appeal.

The time for filing the bond on appeal was extended, by the order of the district judge, until the 18th of April, and on the 14th an order was passed showing that the assignees had filed their bond in the penalty of \$10,000. On the 6th of May the assignees informed the counsel for the petitioners that they would not allow the use of their names in the prosecution of this appeal.

The petitioners therefore asked, in consideration of the surprise occasioned to them by this information, and also upon the



ground that an appeal from the order of the district judge in such a case as that before him was not allowed by the act, that the court would give them leave to file their petition new presented and grant them appropriate relief.

*Bradley T. Johnson*, for petitioners.

*Chandler and C. Dabney*, for respondents.

CHASE, C. J.—The petition invokes the exercise of the jurisdiction of superintendence, conferred upon the Circuit Courts by the 2d section of the Bankrupt Act, which provides that “the several Circuit Courts within and for the districts where the proceedings in bankruptcy shall be pending shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process of any party aggrieved, hear and determine the case as a court of equity.”

In the consideration of this petition it becomes necessary to ascertain, if possible, the nature and extent of the jurisdiction thus conferred.

It is clear that it must be exercised over proceedings in bankruptcy already pending in the District Court, and it seems to be a reasonable interpretation that it does not extend to decisions of the District Court from which appeals may be taken.

By the 8th section, appellate jurisdiction of such decisions was conferred upon the Circuit Court in four classes of cases: 1st. By appeal in cases in equity decided in the District Court under the jurisdiction created by the act; 2d. By writs of error in cases at law decided in the exercise of that jurisdiction; 3d. By appeal from decisions rejecting wholly or in part the claims of supposed creditors; and 4th. By appeal from decisions allowing such claims.

In the first two classes of cases the appeal or writ of error is given to the unsuccessful party to the suit, whether in equity or at law; in the third class it is given to the dissatisfied creditor; in the fourth to the dissatisfied assignee.

The suits belonging to the first two classes of cases seem to be those of which concurrent jurisdiction is given to the Circuit and District Courts by the 8th section; for no jurisdiction of cases at

law or in equity relating to the estate, rights, or liabilities of the bankrupt is expressly given to the District Court elsewhere than in the 3d clause of the 2d section; though this jurisdiction may be well enough held to be included in the general grant of the 1st section.

If this view is correct, and the jurisdiction of the District Court under the act, spoken of in the 8th section, is the jurisdiction defined by the 3d clause of the 2d, the appellate jurisdiction by appeal and writ of error from decisions in the exercise of that jurisdiction must be regarded as limited to suits at law or in equity, by assignees against persons claiming adverse interests, or by such persons against assignees.

From these premises the necessary deduction is that the appellate jurisdiction, strictly so called, conferred upon the Circuit Courts, is limited to these controversies between assignees and the claimants of adverse interests, and to controversies between assignees and creditor-claimants touching the allowance of claims.

But there must be, obviously, numerous decisions by District Courts and district judges sitting at chambers which are not included in either of these categories.

The order complained of in the petition is an example. It is not a decree in equity; nor a judgment at law; nor a rejection of claim in whole or in part; nor an allowance of a claim.

From this order, then, it is clear no appeal could be taken.

On this point there seems to have been a misapprehension both of counsel and of the district judge; for an appeal was allowed, though not in time; and, afterwards, the time for filing the appeal bond was extended. Of this nothing more need be said now than that the right of appeal, as given by the statute, can neither be enlarged nor restricted by the District or the Circuit Court. The regulation of appeals is a regulation of jurisdiction. The Circuit Court has no jurisdiction of any appeal in any case under the Bankrupt Act from the District Court, unless it is claimed, and bond is filed at the time it is claimed, and notice of it given, as required by the 8th section of the act, within ten days after the entry of the decree or decision appealed from; or unless it is entered at the term of the Circuit Court first held within and for the proper district next after the expiration of the ten days from the time it was claimed.

This is mentioned here only to correct the misapprehension

which seems to prevail concerning the jurisdiction of this court upon appeals.

Returning, then, to the order mentioned in the petition, and finding it, as already stated, to be one from which no appeal can be taken, the conclusion is inevitable that it is one which may be reviewed in the exercise of the power of general superintendence, or that it cannot be reviewed at all.

It may be said that the superintending jurisdiction does not extend to decisions of the District Court, or of the district judge at chambers; and certainly if it does not extend to both, it extends to neither; for the 1st section of the act gives the same jurisdiction to the district judge at chambers as to the District Court. This construction would limit the revisory jurisdiction of the Circuit Court to that given in the 8th section.

But it is plain that this construction is not the correct one. It would indeed nullify the operation of the most important clause of the 2d section, for it would limit the superintending jurisdiction to the proceedings of assignees and registers; and these seem to be already placed by the 1st clause under the supervision of the District Court.

The better, and indeed, as it seems to me, the only construction which gives due effect to all parts of the act relating to revisory jurisdiction, seems to be that which on the one hand excludes from the category of general superintendence and jurisdiction of the Circuit Court the appellate jurisdiction defined by the 8th section; and, on the other, brings within that category all decisions of the District Court, or the district judge at chambers, which cannot be reviewed upon appeal or writ of error under the provisions of that section.

The exercise of this general jurisdiction is not placed by the act under specific regulations and restrictions, like the proceeding by appeal or writ of error. It was doubtless thought most advisable to leave its regulation to the discretion of the court and to the rules to be prescribed by the Supreme Court. As yet, the Supreme Court has prescribed no rule concerning it; nor has this court.

In the case before us its exercise must depend on the sound discretion of this tribunal. Unreasonable delay in invoking the superintending jurisdiction should certainly not be allowed. Nor,

on the other hand, should such excessive rigor be exercised that the ends of justice will probably be defeated.

Leave is given to file the petition, and other questions are reserved until the coming in of affidavits; and in the mean time let further proceedings under the order of the District Court be suspended.

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*United States Circuit Court. Southern District of Ohio.*

WILLIAM H. LANGLEY v. LEMUEL PERRY.

The Circuit Court under the 2d section of the Bankrupt Act has jurisdiction to revise the rulings and judgment of the District Court in proceedings in bankruptcy upon bill filed.

A general assignment of all a debtor's property for the benefit of his creditors, is not necessarily a conveyance with intent to delay, defraud, or hinder creditors.

And where such an assignment is made with intent to secure an equal distribution of all the debtor's property among all his creditors, it is not necessarily a conveyance of property with intent to defeat or delay the operation of the Bankrupt Act.

To make such an assignment an act of bankruptcy, it must be made with intent to delay, defraud, or hinder creditors within the meaning of the statute of 13 Elizabeth, or with intent to defeat or delay the operation of the Bankrupt Act.

THIS was a bill in equity, filed by Langley against Perry, to revise and reverse an adjudication of bankruptcy, by the District Court, on the petition of Perry against Langley. The bill set out the proceedings in the District Court. At the hearing it was agreed by counsel, with the assent of the court, that the complainant should amend his bill by making copies of all the proceedings in the District Court, including a bill of exceptions embodying all the testimony, &c., part of the bill, to the end that the whole case of Perry v. Langley, in the District Court, from the filing of the petition, should be before the Circuit Court; and thereupon the bill was so amended. The defendant, Perry, demurred.

Langley was a resident of Gallia county, Ohio. Among other creditors, he owed Perry, who brought suit against him, and recovered a judgment at a term of the court commencing on May 27th 1867.

On the 25th of May 1867, Langley, being insolvent, made a general assignment of all his property, in trust for all his cre-

ditors. The assignees accepted the trust, and, on the 25th of May 1867, filed the deed in the Probate Court of Gallia county, under the statutes of Ohio, and proceeded to administer the trust.

On the 17th of July 1867, Perry filed a petition against Langley in the District Court, setting forth the assignment, and claiming that it was made with intent to hinder and delay him in the collection of his debt; and also with intent, by such disposition, to defeat and delay the operation of the Bankrupt Act, and was, therefore, an act of bankruptcy. Langley answered, denying the intent charged. Perry proceeded to take testimony, and it is set forth in the bill of exceptions. Langley offered no testimony, and the case was heard upon the testimony offered by Perry only. The District Court held the assignment an act of bankruptcy, and declared Langley a bankrupt. The opinion of the judge is reported in 7 Am. Law Reg. (N. S.) 429.

This bill was filed to reverse that judgment.

*C. D. Coffin*, for Langley.

*Nash & Lincoln*, for Perry.

SWAYNE, Circuit J., held<sup>1</sup> :—

1. That the Circuit Court, under the 2d section of the Bankrupt Act, had jurisdiction in this manner to revise and correct and reverse the rulings and judgment of the District Court in proceedings in bankruptcy.

2. That where a creditor is about to recover a judgment against his debtor in Ohio, and the debtor makes a general assignment of all his property, for the benefit of all his creditors, before the judgment is rendered, such conveyance is not necessarily a conveyance with intent to delay, defraud, or hinder creditors.

3. And where such an assignment is made under like circumstances, with intent to secure an equal distribution of all the debtor's property among all his creditors, it is not necessarily a conveyance of property with intent to defeat or delay the operation of the Bankrupt Act.

4. To make such an assignment an act of bankruptcy, it must be made with intent to delay, defraud, or hinder creditors within

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<sup>1</sup> The opinion of Justice SWAYNE was delivered orally; but we are furnished with the above abstract by counsel, and are assured that it is reliable.—EDS. AM. LAW REG.

the meaning of the statute of 13 Elizabeth, or with intent to defeat or delay the operation of the Bankrupt Act. It becomes a question of fact. The innocence or guilt of the act depends on the mind of him who did it, and it is not a fraud within the meaning of the Bankrupt Law, unless it was meant to be so. Here the proof submitted in the case is clear that the assignment was an honest act, and was not intended either to defraud creditors or defeat or delay the operation of the Bankrupt Act.

The demurrer is overruled; judgment of the District Court reversed, and the cause remanded to the District Court.

In the still later case of *THOMAS W. FARRIN v. JOHN CRAWFORD*, in the same court, Justice SWAYNE affirmed his ruling in the principal case, that an assignment for the benefit of creditors is not, *ipso facto*, an act of bankruptcy; and that the Circuit Court would review the adjudication of the District Court in bankruptcy cases *on the facts* under the supervisory power given by the act. In this last-mentioned case the Circuit Judge reviewed the testimony at some length, and while dissenting from the conclusion of the district judge that an assignment was *per se* an act of bankruptcy, held the transaction in this case to be such an act, because it was not in fact an assignment of all the debtor's property.

These cases, and the foregoing (*Matter of Alexander*, ante, p. 423), are among the few in which the *supervisory* powers of the Circuit Courts have been passed upon by a judge of the Supreme Court, and the liberal construction given to section 2, by the Chief Justice and Justice SWAYNE, renders this a very extensive and important jurisdiction to which perhaps the attention of the profession has not been very much directed.

In *Ex parte O'Brien*, 6 Int. Rev. Rec. 182, the decision of the District Court that a *femè covert* trader is within the

Bankrupt Act, and may be declared a bankrupt, was sought to be reviewed on appeal. Justice NELSON, of the Supreme Court, held that the adjudication could not be reviewed on appeal, and his language would appear to favor a very restricted construction of the power granted by section 2; but, in connection with the foregoing decisions, it may be understood as applying only to the form in which the case was then presented.

In the *Matter of John M. Reed*, 2 Bank. Reg. 2, the Circuit Court for the Northern District of Ohio, JJ. SWAYNE and SHERMAN held that the supervisory power was to be exercised by petition and not by appeal.

In *Ruddick v. Billings*, 2 West. Jur. 275, Justice MILLER, of the Supreme Court, expressed great doubt if an adjudication of bankruptcy could be reviewed by appeal or writ of error under section 8, but was clearly of opinion that any creditor considering himself aggrieved by the discharge of a bankrupt, could be heard upon petition under section 2.

The whole subject of the jurisdiction of the Circuit Court in bankruptcy, will be found elaborately treated by a very distinguished Ohio jurist, in an article in our pages, ante vol. 7, N. S. p. 641.

J. T. M.

*Supreme Court of California.*

## THE PEOPLE v. TYLER.

Where a statute authorizes but does not compel a party indicted to become a witness in his own behalf, it is improper for the prosecution to comment to the jury on the prisoner's refusal to offer himself as a witness, and the court should when requested charge that no inference was to be drawn against the prisoner from his refusal.

THE opinion of the court was delivered by

SAWYER, C. J. (after disposing of some local points affecting the regularity of the proceedings).—The highly important question in the case arises under the Act of April 2d 1866, entitled "An Act relating to criminal prosecutions," which provides as follows: "Section 1. In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the court. Section 2. Nothing herein contained shall be construed as compelling any such person to testify." Stat. 1865-6, p. 865.

At the trial the defendant did not avail himself of the right conferred by this act to offer himself as a witness on his own behalf. During the argument of the case, the District Attorney called the attention of the jury to the fact, that the defendant had not testified in his own behalf, and argued and insisted before said jury that the silence of the defendant was a circumstance strongly indicative of defendant's guilt. Defendant's counsel objected to this course of argument, and requested the court to require the District Attorney to refrain from urging such inference, but the court declined to interfere, and intimated that the law justified the counsel in the course pursued. The District Attorney thereupon continued to urge before the jury, that the silence of the defendant was a circumstance tending strongly to prove his guilt, and the counsel for the prisoner excepted.

At the close of the argument of the case to the jury, the defendant's counsel asked the court to give to the jury the following instruction: "The jury should not draw any inference to the

prejudice of the defendant from the fact that he did not offer himself as a witness in his own behalf. It is optional with a defendant to do so or not, and the law does not intend that the jury should put any construction upon his silence unfavorable to him." The court refused to give the instruction, and defendant excepted. The action of the court in the premises is claimed to be erroneous.

The act under which the question arises, constitutes one of the advances recently made by our legislation in the law of evidence. The principle embraced in the act was first adopted in Maine, we believe, and it has, as yet, so far as we are advised, found a place in the statutes of but few of the states. No decision under similar statutes has been called to our attention, and we are not aware that it has been the subject of judicial construction. The policy of such a statute has been considerably discussed by law writers and others, and, to our minds, the strongest objection that has been urged against it is, that it places a party charged with crime in an embarrassing position; that even when innocent, a party on trial upon a charge for some grave offence may not be in a fit state of mind to testify advantageously to the truth even, and yet, if he should decline to go upon the stand as a witness, the jury would, from this fact, inevitably draw an inference unfavorable to him, and thus he would be compelled, against the humane spirit of the common law, to furnish evidence against himself, negatively at least, by his silence, or take the risk under the excitement incident to his position of doing worse, by going upon the stand and giving positive testimony. The object of the statute is undoubtedly beneficent. It was designed to afford a party charged with crime, and who must necessarily be cognisant of the true state of the case, an opportunity to controvert or explain any fact that may appear to be against him. It was designed to facilitate the attainment of truth, and to advance the ends of justice, by opening the door under certain wise restrictions consistent with the humane policy of the law, not to compel a party to criminate himself, to all the avenues and sources of truth.

We intimated our approbation of modern progress in the law of evidence in some other particulars in the case of *The People v. Jones*, 31 Cal. 573, and we are favorably disposed to the act now under consideration. We so intimated in the case of *The People v. Farrell*, 31 Cal. 583. But while we are hopeful that future experience will justify the wisdom of this important change in the



law, we cannot deny that it has, as yet, not been in force sufficiently long to develop its practical workings. In order, however, that the results may answer the expectations of those legislators who adopted it, and the ends of truth and justice be promoted, the statute must be examined, construed, and enforced by the courts, in the same liberal and beneficent spirit that prompted its adoption, otherwise it will become an instrument of wrong and injustice, if not of absolute and intolerable oppression; and in this spirit it is our duty to construe and enforce it.

Upon an examination of the act we find that a person charged with an offence, "shall, *at his own request, but not otherwise*, be deemed a competent witness." It is optional with him, then, whether he shall testify or not; and section 2 provides, that "Nothing herein contained shall be construed as compelling any person to testify." This is but a re-enactment by the statute of that provision of our State Constitution, which says, no person "shall be compelled in any criminal case to be a witness against himself:" Art. I., sec. 8.

At the trial, by his plea of not guilty, the party charged denies the charge against him. This is itself a positive act of denial, and puts upon the people the burden of affirmatively proving the offence alleged against him. When he has once raised this issue by his plea of not guilty, the law says he shall thenceforth be deemed innocent till he is proved to be guilty, and both the common law, and the statute, give him the benefit of any reasonable doubt arising on the evidence. Now, if, at the trial, when, for all the purposes of the trial, the burden is on the people to prove the offence, charged by affirmative evidence, and the defendant is entitled to rest upon his plea of not guilty, an inference of guilt could legally be drawn from his declining to go upon the stand as a witness, and again deny the charge against him in the form of testimony, he would practically, if not theoretically, by his act declining to exercise his privilege, furnish evidence of his guilt that might turn the scale, and convict him. In this mode he would indirectly and practically *be deprived of the option* which the law gives him, and of the benefit of the provisions of the law and the Constitution, which say, in substance, that he shall not be compelled to criminate himself. If the inference in question could be legally drawn, the *very act of exercising his option* as to going upon the stand as a witness, *which he is necessarily compelled by*

*the adoption of the statute to exercise one way or the other, would be, at least, to the extent of the weight given by the jury to the inference arising from his declining to testify, a crimination of himself.*

Whatever the ordinary rule of evidence with reference to inferences to be drawn from the failure of parties to produce testimony that must be in their power to give may be, we are satisfied that the defendant, with respect to exercising his privilege under the provisions of the act in question, is entitled to rest in silence and security upon his plea of not guilty, and that no inference of guilt can be properly drawn against him from his declining to avail himself of the privilege conferred upon him to testify on his own behalf; that to permit such an inference, would be, to violate the principles and the spirit of the Constitution and the statute, and defeat, rather than promote, the object designed to be accomplished by the innovation in question.

We are of opinion, therefore, that the court erred in permitting the District Attorney to pursue the line of argument to which objection and exception were taken, and intimating its approbation of the ground taken, and, especially after what had transpired, in refusing the instruction asked on behalf of defendant for the purpose of correcting any erroneous view that might have been impressed on the minds of the jury. We think such instruction proper in all cases where the defendant desires it.

Judgment reversed, and a new trial ordered.

### *Court of Appeals of Kentucky.*

JOHN D. ELLIOTT, APPELLANT, v. HENRY NICHOLS, APPELLEE.

A conveyance to husband and wife and their heirs prior to 1850, constituted in Kentucky, as at common law, an estate by entireties, which neither husband nor wife could sever or make liable for debts as against the other.

The statute of 1850, abolishing the right of survivorship and turning the estate into a tenancy in common, is not retrospective.

*Scilicet*, the legislature would have had no constitutional power to divest parties of such right of survivorship acquired by a conveyance in entireties before the passage of the statute.

APPEAL from Nelson Circuit Court.

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The opinion of the court was delivered by

WILLIAMS, C. J.—January 3d 1837 Henry Nichols conveyed to his daughter Elizabeth, and her husband, Henry Nichols, certain lands to them and their heirs for ever, which, together with other lands the husband mortgaged, March 9th 1865, to appellants, to secure various specified debts.

Mrs. Elizabeth Nichols died in the year 1861, leaving appellees as her children and heirs at law, who resist the foreclosure of the mortgage on one-half of the land so conveyed by their grandfather to their father and mother, claiming that by the Revised Statutes enacted in the year 1850, the right of survivorship was abolished in such estates, and they held as tenants in common, and therefore by moieties, with a mutual right of curtesy and dower of the survivor in the half of the other, hence they insist that the creditors could only foreclose as to the life interest of their father as tenant by the curtesy in their mother's half of said land. Sect. 14, art. 4, ch. 47, 2 Stant. Rev. Stat. 27, provided that "where any real estate or slave is conveyed or devised to husband and wife, unless a right of survivorship is expressly provided for, there shall be no mutual right to the entirety by survivorship between them, but they shall take as tenants in common, and the respective moieties be subject to curtesy or dower with all other incidents to such a tenancy."

By sect. 14, ch. 21, 1 Stant. Rev. Stat. 262, it is declared that "no part of this revision is retrospective unless expressly so declared." And although the language and construction of the enactment relative to such estates might be construed to apply to existing titles, and abolish the right of survivorship between husband and wife, and change the estate from an entirety into one in common, yet as the language is not necessarily expressive of such an intention, we would not hasten to give it a retrospective application, especially in view of a want of constitutional authority in the legislature to so enact. Husband and wife having but one, united legal existence, conveyances to them by the common law which remained in force in this state until our revision of 1850, created a peculiar estate in which both held the entire title, consequently the death of either conferred no new estate or title on the other, but only destroyed the possibility of the decedent's survivorship, in which case that one would have remained the sole

owner. By the common law joint tenants could destroy the right of survivorship by the sale of their respective portions, or by compelling, as they could do, partition, whilst this peculiar tenancy of husband and wife could not be destroyed by the sale of either, nor could partition be compelled by any means known to the law.

This possibility of survivorship, and contingent possibility that the unity between joint tenants would not by any means be destroyed, and the right of survivorship remain, was not such a present vested interest as created or constituted an estate, either leviable by execution, subject to decretal sale, or even vendible and assignable by the tenant himself, but was a mere legal incident to such estate, as a rule of law, which the legislature might abolish. So in *Edwards v. Varrick*, 5 Davies 668, the Court of Errors of New York, in able, exhaustive opinions by Judge BEARDSLEY and others, held that when a father had devised two separate tracts of land severally to his sons Joseph and Medcif and their heirs and assigns, but should either die without lawful issue his tract to go to the survivor, and left the two sons executors, with others, and they, as executors, mortgaged Joseph's tract, and Joseph having afterwards died without issue, and subsequently Medcif died leaving issue, who brought ejectment against the mortgagee in possession, it was held that by the father's will Joseph took a determinable, qualified, or base fee in the land primarily devised to him, which was certainly effective as an estate for life, but that no present estate or interest therein passed to Medcif during Joseph's life, his interest being what the law terms a mere possibility of future interest, which, being neither an estate, interest, nor right *in esse*, was incapable of being transferred by grant or assignment at law.

In equity, however, when a party, for a valuable consideration, has sold such a possible interest, he will be deemed the trustee of his vendee, and, when he gets the title, as holding it for him, and compelled to release it to the vendee.

But, as said by the Court of Appeals of Virginia in *Thornton v. Thornton*, 3 Randolph 183, all the books agree *una voce* that husband and wife not only cannot compel each other to make partition, but, even if they concur in the wish, they have not the power to sever the tenancy.

It is a sole, and not a joint, tenancy. They have no *moieties*. Each holds the entirety. They are one in law, and their *estate one and indivisible*. If the husband alien, if he suffer a recovery, if he be attainted,—none of these will affect the right of the wife, if she survive him. Nor is this by the *jus accrescendi*. There is no such thing between them. That takes place where, by the death of one joint tenant, the survivor receives an accession, something which he had not before—the *right of the deceased*. But as between husband and wife the survivor *takes nothing from the decedent*, acquires no new title, nor interest, nor estate thereby, but takes by the original conveyance the whole, because invested thereby with the entire estate. The survivor gets the entire estate by virtue of the title being in him, or her, by the original conveyance, but rid of the possible contingency of the other surviving and retaining the estate because likewise so invested in that party. It is plain, therefore, that the husband had the entire title to this land by the original conveyance in the year 1837; so had his wife; and had she survived him she would have retained it, and neither the husband, nor his heirs or assigns, nor the mortgagees, nor even the purchasers under a decretal sale foreclosing the mortgage, would have held against her. Nor can her heirs claim or hold any portion of the land as against the surviving husband or his assigns, but the whole tract should have been ordered to be sold in payment of the mortgage-debts, or a sufficiency for said purpose. As the entire title and estate was vested in both the husband and wife, the legislature could not have divested any portion of the title, and, we must presume, did not intend to do so, but that as a rule of property, and a declaration of the legal effect of such deed subsequently made and the legal rights of the parties thereunder, said statute was enacted. The numerous cases recognising the common-law rules as to such conveyances by this court need not be referred to, all harmonizing as they do with this opinion.

Judgment reversed.

## ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.<sup>1</sup>SUPREME COURT OF KANSAS.<sup>2</sup>SUPREME COURT OF NEW HAMPSHIRE.<sup>3</sup>SUPREME COURT OF NEW YORK.<sup>4</sup>

## ACTION.

*Joinder of different Causes growing out of same Transaction.*—A cause of action for false imprisonment may be joined with a cause of action for slander, when both arise out of the same transaction: *Harris v. Avery*, 5 Kan.

In such a case, where the petition alleges that both causes of action arose out of the same transaction, and when the other facts stated in the petition are not inconsistent with such allegation, *Held*, that a demurrer to the petition on the grounds "that it appears on the face of the petition that several causes of action are improperly joined," should be overruled: *Id.*

## ADMIRALTY.

*Pilot Laws—Collision.*—A state pilot law having provided for the educating and licensing of a body of pilots, enacted that all masters of foreign vessels bound to or from one of the state ports "shall take a licensed pilot, or, in case of refusal to take such pilot, shall pay pilotage as if one had been employed." It enacted further, that any person not licensed as a pilot, who should attempt to pilot a vessel as aforesaid, should be "deemed guilty of a misdemeanor, and, on conviction, be punished by a fine not exceeding \$100, or imprisonment not exceeding sixty days," and that all persons employing any one to act as a pilot not holding a license, should "forfeit and pay the sum of \$100." The pilot first offering his services to a vessel inward bound had a right to pilot her in, and when she went out the right to pilot her out. *Held*, that under this statute vessels were compelled to take a pilot: *The China*, 7 Wall.

*But held*, further (the statute containing no clause exempting the vessel or owners from liability for the pilot's mismanagement), that the responsibility of the vessel for torts committed by it not being derived from the law of master and servant, or from the common law at all, but from maritime law, which impressed a maritime lien upon the vessel in whosoever hands it might be for torts committed by it, the fact that the statute thus compelled the master to take the pilot did not exonerate the vessel from liability to respond for torts done by it, as, *ex. gr.*, for a collision, though the result wholly of the pilot's negligence: *Id.*

*Collision.*—Although the rules of navigation require that a vessel

<sup>1</sup> From J. W. Wallace, Esq., Reporter, to appear in 7 Wall. Reports.

<sup>2</sup> From Hon. C. K. Gilchrist, to appear in 5 Kansas Reports.

<sup>3</sup> From the Judges, to appear in 48 N. H. Reports.

<sup>4</sup> From Hon. O. L. Barbour, Reporter; to appear in vol. 52 of his Reports.

coming up behind another, and on the same course with her, shall keep out of the way, yet the rule presupposes that the other vessel keeps her course, and it is not to be applied irrespective of the circumstances which may render a departure from it necessary to avoid immediate danger: *The Grace Girdle*, 7 Wall.

Where, in case of collision with loss, there is reasonable doubt as to which party is to blame, the loss must be sustained by the one on which it has fallen: *Id.*

This court will not readily reverse in a case of collision depending on a mere difference of opinion as to the weight and effect of conflicting testimony, where both the District and Circuit Courts have agreed. It affirmed accordingly a decree in such a case: *Id.*

#### AGREEMENT.

*In Fraud of Creditors; Account of Transactions under.*—An action will not lie to compel the defendant to render an account of his receipts and expenditures, and of his transactions, and to convey to the plaintiff real estate which he holds under a trust agreement entered into for the benefit of the plaintiff, where it appears that the object of such agreement was to prevent a creditor of the plaintiff from enforcing and collecting a judgment and demands held against him, and that it was designed to hinder and delay such creditor in the collection of judgments: *Sweet v. Tinslar*, 52 Barb.

An agreement of that nature is fraudulent in point of fact and in law; and as fraud vitiates all contracts, the court will not lend itself to aid either party in its enforcement. Nor will it assist one of them, by directing an accounting and a conveyance of real estate by the other: *Id.*

*Setting aside in Equity.*—The doctrine is well settled that a court of equity will not set aside an agreement intended to defraud third parties, as between the parties themselves: *Id.*

#### CHECKS.

*Time of Presentment.*—It is well settled that presentment of a check or draft on a bank, the day after it is drawn, is in season. Checks and drafts are subject to the same rule in this respect: *Kelty et al. v. The Second National Bank of Erie*, 52 Barb.

Where the facts are not disputed, whether due diligence has been used is a question of law for the court: *Id.*

*What is a Payment of.*—Where, on presentment of a check or draft, the holder receives from the drawee a check for the amount, such check is not a payment, if not paid; and hence the draft does not cease to be a valid obligation. The subsequent return of the check and receipt of the draft, and protest of the latter, in due season, will preserve its vitality, and the holder may recover the amount from the drawers: *Id.*

#### CIRCUIT COURT

*Jurisdiction and Practice.*—The Act of February 28th 1839, § 8, 5 Stat. at Large 322, providing for the transfer, under certain circumstances named in it, of a suit from one Circuit Court to the most conve-

nient Circuit Court in the next adjacent state, is not repealed by the Act of March 3d 1863, 12 Stat. at Large 768, providing that under certain circumstances named in it, the circuit judge of one circuit may request the judge of any other circuit to hold the court of the former judge during a specified time: *Supervisors v. Rogers*, 7 Wall.

A court of the United States has power to adopt in a particular case a rule of practice under a state statute; and where a Circuit Court is possessed of a case from another circuit, under the above-mentioned Act of 1839, it may adopt the practice of the state in which the Circuit Court is held from which the case is transferred, as fully as could the Circuit Court which had possession of the case originally: *Id.*

#### CORPORATION.

*Dissolution.*—The insolvency of a corporation, or the fact that it has assigned all its property and effects to an assignee for the benefit of its creditors, does not extinguish its legal existence. Neither does the failure to elect officers or to hold meetings for many years dissolve the corporation: *Parsons v. Eureka Powder Works*, 48 N. H.

#### DAMAGES.

*When Exemplary Damages may be given.*—Exemplary damages are only to be given in case of fraud, malice, gross negligence, or oppression: *Cram v. Hadley*, 48 N. H.

The court erroneously instructed the jury, with the assent of counsel for defendant, that they might give exemplary damages in the case if they saw fit, when there was no evidence that warranted such instructions. After verdict for plaintiff and a motion by defendant to set the same aside as against the law and the evidence, *Held*, that if it did not appear affirmatively from the verdict or the evidence reported, whether any exemplary damages were given, or, if any, how much, the verdict would not, under these circumstances, be set aside: while, if defendant's counsel had seasonably objected to the instructions given and requested the proper instructions, the entire verdict, under similar circumstances, would be set aside: *Id.*

But when it appears affirmatively, either by the verdict or the evidence reported, that exemplary damages were given, and to what amount, the court will, even under the circumstances of this case, correct the error in the verdict by ordering a *remittitur* for such exemplary damages and allowing the plaintiff to take judgment for the residue: *Id.*

Where a trade was negotiated between the plaintiff and defendant by a third person, one B., and the question is, "What was the understanding of the two parties in relation to the trade?" after the terms of the offer or proposition which the defendant made to B. are shown by competent evidence, then it may be shown, either by B. or by the plaintiff, that the same offer or proposition was communicated by B. to the plaintiff and accepted by him: *Id.*

#### DEED.

*Description of Encumbrance.*—A deed conveying premises "subject to a certain mortgage executed by the parties of the first part on said



premises, in the year 1856, of \$1000," sufficiently describes the mortgage; as an examination of the record will disclose the name of the mortgagee and the date of the record: *Johnson v. Zink*, 52 Barb.

#### EVIDENCE.

*Lost Instrument—Time of Objection to Competency of Evidence.*—When the only evidence of the loss or destruction of a written instrument is that of one witness, who testifies as follows: "The order is now so mislaid that I cannot find it:" *Held*, that all oral or other secondary evidence of its contents is incompetent and inadmissible: *Johnson & Sweeney v. Mathews*, 5 Kan.

The proper time to object to the introduction of testimony for incompetency is when such testimony is offered in evidence at the trial: *Id.*

A party who does not object, while a deposition is being taken, to the testimony of a witness, on the ground that it is or may be at the trial incompetent, does not thereby waive his right to make such objection at the trial: *Id.*

The plaintiffs in their petition alleged, "that the defendant contracted to transport a brick machine for them from Kansas City to Fort Scott without delay, which he neglected and refused to do," but they did not allege or attempt to prove on the trial that the defendant at the time of making the contract had any knowledge of what the plaintiffs wanted to do with the machine, or that they intended or expected to have any hired hands to run the machine. *Held*, that the court did not err in excluding all evidence tending to show that plaintiffs had a large number of hands in their employ who were idle on account of not getting the machine at the time it should have been delivered: *Id.*

#### EXECUTOR.

*Suits against in New Hampshire.*—If a suit be prematurely brought against an executor, upon a debt due by the deceased, under sec. 1, chap. 161, Rev. Stats., being within one year from the granting of administration, the executor must plead that fact in abatement and not in bar: *Amoskeag Manufacturing Co. v. Barnes*, 48 N. H.

But in a suit against such executor on such claim, the plaintiff must prove affirmatively, as a part of his case, even under the general issue pleaded, that his claim was presented to the executor within two years from the granting of administration according to the provision of sec. 2 of said chapter, and without such affirmative proof he cannot recover: *Id.*

When such suit is brought against such executor on such claim more than three years after the granting of administration, such executor (except in certain specified cases) must plead in bar the limitation contained in sec. 5 in said chapter: *Id.*

The executor is not at liberty in such case to omit to plead the limitation of that statute, as he may the general Statute of Limitations, in cases where the debt is otherwise just: *Id.*

Nor can the executor by any new promise or guaranty take said claim out from the operation of this provision of the statute, but the same will be barred after the expiration of said three years as against the estate, though said executor may make himself personally liable by such new promise: *Id.*

## FORECLOSURE SALE.

*Right of Purchaser to Rents.*—A purchaser at a foreclosure sale is not entitled to the rents of the mortgaged premises which accrue between the sale and the delivery of the deed, where such purchaser does not complete his purchase at the time designated in the terms of sale: *Mitchell v. Bartlett*, 52 Barb.

Thus, where the purchaser refused to complete his purchase, and the premises were resold, and the second purchaser also refused, and the premises were resold a third time, and were bought by a person acting for the original purchaser, when the sale was completed by the latter under his first purchase: *Held*, that he was not entitled to the intermediate rents: *Id.*

In such a case the deed does not relate back to the day of sale, so as to entitle the purchaser to the rents accruing between the sale and the giving of the deed; where he has by his own act, and in violation of his contract, delayed the completion of the purchase: *Id.*

## FRAUDS, STATUTE OF.

*Agreement not within.*—Although hop-roots, when rooted in the ground, are a part of the real estate of the proprietor of the soil, and will pass to the purchaser by a conveyance of the land, and to the heir, by inheritance, yet where the plaintiff agreed by parol to deliver to the defendant a quantity of hop-roots, at a future time, at a specified price per bushel: *Held*, that this was not an agreement to sell or purchase an interest in real estate, but was an executory contract by the plaintiffs to purchase for, or to sell and deliver to, the defendant, an article of merchandise which, when delivered, would be personal property, and was, therefore, not within the Statute of Frauds requiring such agreement to be in writing: *Webster et al. v. Zielly*, 52 Barb.

*Note or Memorandum.*—The Statute of Frauds does not require the note or memorandum therein specified to be made and subscribed by the party to be charged at the time of making the agreement. It may be made at any time afterwards, and before the time for its consummation: *Id.*

A subsequent written recognition of a contract void by the Statute of Frauds is not only a ratification of it, but is a sufficient note or memorandum of the contract within the statute: *Id.*

*Payment of part of Price.*—The payment of a part of the purchase-money, on a contract for the sale of personal property exceeding \$50 in value, need not be made at the time of making the original contract. If the payment be made subsequently by the one party and accepted by the other, as the consummation of the prior agreement, it brings the case within the spirit and intent of the Statute of Frauds, and will be considered paying a part of the purchase-money at the time: *Id.*

## FRAUDULENT CONVEYANCES.

Where a conveyance shows, on its face, that its object and effect was to prevent, at least temporarily, the enforcement by a creditor of his demands against the grantor, and to obstruct and hinder their collection, it is void and in violation of the statute prohibiting such conveyances or

assignments of property; and upon no legal principle can it be upheld: *Sweet v. Tinslar*, 52 Barb.

The rule is well settled that where two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interfere to relieve either of such persons, as against the other, from the consequences of his misconduct: *Stewart et al. v. Ackley et al.*, 52 Barb.

GOLD COIN. See *Legal Tender Notes*.

#### INSURANCE.

*Proximate Cause*.—Cotton in a warehouse was insured against fire, the policy containing an exception against fire which might happen "by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power, *explosion*, earthquake, or hurricane." An explosion took place in another warehouse, situated directly across a street, which threw down the walls of the first warehouse, scattered combustible materials in the street, and resulted in an extensive conflagration, embracing several squares of buildings, and among them the warehouse where the cotton was stored, which, with it, was wholly consumed. The fire was not communicated from the warehouse where the explosion took place directly to the warehouse where the cotton was, but came more immediately from a third building which was itself fired by the explosion. Wind was blowing (with what force did not appear) from this third building to the one in which the cotton was stored. But the whole fire was a continuous affair from the explosion, and under full headway in about half an hour. *Held*, that the insurers were not liable; the case being one for the application of the maxim, "*Causa proxima, non remota spectatur*:" *Insurance Co. v. Tweed*, 7 Wall.

#### INTERNATIONAL LAW.

*Sale of Ship by Belligerent*.—A *bonâ fide* purchase for a commercial purpose by a neutral, in his own home port, of a ship of war of a belligerent that had fled to such port in order to escape from enemy vessels in pursuit, but which was *bonâ fide* dismantled prior to the sale and afterwards fitted up for the merchant service, does not pass a title above the right of capture by the other belligerent: *The Georgia*, 7 Wall.

#### LANDLORD AND TENANT.

*Rent reserved to be paid by Repairs*.—By a lease, dated March 15th 1864, plaintiff leased a house of the defendant for the term of five years, "the said Smith yielding and paying therefor rent by" certain specified repairs on the house; "and the said lessee promises to pay the said rent in the repairs, work, materials, and additions, &c., as above set forth, all to be completed during the years A. D. 1864 and 1865;" "and that said lessors may enter to expel the lessee if he shall fail to pay the rent as aforesaid." Plaintiff did not make all the repairs before 1866, and in January 1866, the defendant expelled the plaintiff from the house.

In *assumpsit* for labor and materials by the plaintiff to recover for the repairs made by him in 1864 and 1865 upon the house: *Held*, that plaintiff would be entitled to recover, if the real value of his repairs

and additions to the house exceeded the fair value of his use and occupation of the premises down to the time when he was expelled, and also the damage suffered by the defendant from the breach or breaches of the contract by the plaintiff: *Smith v. Newcastle*, 48 N. H.

Also, *held*, that plaintiff could not maintain such suit until after the expiration of the five years embraced in the original contract: *Id.*

*Right to Manure.*—A tenant at will of buildings only, who occupies part of a barn to keep his cattle and feeds them from his own hay, which he removes from his own farm for that purpose, will be entitled to the manure thus made by his cattle, and may remove or sell the same while such tenancy continues or after it has expired: *Corey v. Bishop*, 48 N. H.

And if the lessor, during the continuance of such tenancy or after it has ceased, sell and convey the premises on which the manure is thus situated, to a third person, not reserving the manure, yet if the purchaser has knowledge of the facts relative to the manure, he cannot hold the same under his deed: *Id.*

*Ejectment by Landlord—Covenant.*—Where, under a clause of re-entry for non-payment of rent reserved, a landlord sues in ejectment, in Indiana (in which state a judgment in ejectment has the same conclusiveness as common-law judgments in other cases), for recovery of his estate, as forfeited, and a verdict is found for him, and judgment given accordingly, the tenant cannot, in another proceeding, deny the validity of the lease; nor his possession, nor his obligation to pay the rents reserved, nor that the instalment of rent demanded was due and unpaid: *Sheets v. Selden*, 7 Wall.

Where, in a lease of a water-power, the lease provides in a plain way and with a specification of the rates for an abatement of rent for every failure of water, the tenant cannot, on a bill by him to enjoin a writ of possession by the landlord, after a recovery by him at law for forfeiture of the estate for non-payment of rent reserved, set up a counter claim for repairs to the water-channel made necessary by the landlord's gross negligence. He is confined to the remedy specified in the lease; a covenant that a lessor will make repairs not being to be implied: *Id.*

In such a case, before he can ask relief from a forfeiture, he should at least tender the difference between the amount of rents due and the amount which he could rightly claim by way of reduction for failure of water: *Id.*

#### LEGAL TENDER NOTES

*Not Taxable.*—United States notes issued under the Loan and Currency Acts of 1862 and 1863, intended to circulate as money, and actually constituting, with the national bank notes, the ordinary circulating medium of the country, are obligations of the National Government, and exempt from state taxation: *Bank v. Supervisors*, 7 Wall.

United States notes are engagements to pay dollars; and the dollars intended are coined dollars of the United States: *Id.*

*Contracts for Payment in Coin.*—A contract to pay a certain sum in gold and silver coin is in substance and legal effect a contract to deliver a certain weight of gold and silver of a certain fineness to be ascertained by count: *Butler v. Horwitz*, 7 Wall.

Whether the contract be for the delivery or payment of coin, or bullion, or other property, damages for non-performance must be assessed in lawful money; that is to say, in money declared to be legal tender in payment, by a law made in pursuance of the Constitution of the United States: *Id.*

There are, at this time, two descriptions of lawful money in use under Acts of Congress, in either of which (assuming these acts, in respect to legal tender, to be constitutional) damages for non-performance of contracts, whether made before or since the passage of these acts, may be assessed in the absence of any different understanding or agreement between the parties: *Id.*

When the intent of the parties as to the medium of payment is clearly expressed in a contract, damages for the breach of it, whether made before or since the enactment of these laws, may be properly assessed so as to give effect to that intent: *Id.*

When, therefore, it appears to be the clear intent of a contract that payment or satisfaction shall be made in gold and silver, damages should be assessed in coin, and judgment entered accordingly: *Id.*

#### LIMITATIONS, STATUTE OF.

*Complaint showing the Cause to be barred is insufficient.*—A petition that shows upon its face that the cause of action is barred by the Statute of Limitations, does not state facts sufficient to constitute a cause of action: *Zune v. Zune*, 5 Kan.

A defendant in default, who has neither answered nor demurred, has not thereby waived his right to object to the sufficiency of such a petition: *Id.*

And in such a case it is error for the District Court to receive evidence, and render judgment on such a petition, over the objections of the defendant: *Id.*

#### NATURALIZATION.

*Foreign Woman.*—The Act of Congress of February 10th 1855, which declares "that any woman, who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen," confers the privileges of citizenship upon women married to citizens of the United States, if they are of the class of persons for whose naturalization the previous Acts of Congress provide: *Kelly v. Owen et al.*, 7 Wall.

The terms "married," or "who shall be married," in the act, do not refer to the time when the ceremony of marriage is celebrated, but to a state of marriage. They mean that whenever a woman, who under previous acts might be naturalized, is in a state of marriage to a citizen, she becomes, by that fact, a citizen also. His citizenship, whenever it exists, confers citizenship upon her: *Id.*

The object of the act was to allow the citizenship of the wife to follow that of her husband, without the necessity of any application for naturalization on her part: *Id.*

The terms "who might lawfully be naturalized under the existing laws," only limit the application of the law to free white women: *Id.*

## NEW TRIAL.

*Review in the Supreme Court.*—The granting or refusing a new trial, for the reason that "the verdict is not sustained by sufficient evidence," must always, to a great extent, be left to the sound discretion of the court trying the cause; and the Supreme Court will not reverse an order of the District Court, setting aside the verdict of the jury and granting a new trial, unless a great preponderance of the evidence appears to sustain the verdict: *Anthony v. Eddy and Arnold*, 5 Kan.

PILOT LAWS. See *Admiralty*.

## PLEADING.

*Contract with Several Undertakings.*—In declaring upon a special contract the entire consideration must be set forth, and must be proved as alleged: *Smith v. Webster*, 48 N. H.

Where a contract consists of several engagements or promises on the part of defendant, quite distinct and separate from each other, but founded on one and the same entire consideration, an action cannot be brought for the breach of any one of such engagements or promises, without setting forth in the declaration the entire consideration applicable to all the promises collectively: *Id.*

But the rule is different in stating the defendant's promise, for the plaintiff is only required to set forth with correctness that particular part of the contract which he alleges the defendant to have broken: *Id.*

*Effect of Plea of Tender—Estoppel.*—Where the cause of action in the declaration is single and indivisible, a plea of tender, or a confession, is an admission of the cause of action laid in the declaration: *Dow v. Epping*, 48 N. H.

But where the cause of action is divisible, as where there are several counts in the declaration, a plea of tender or a confession accompanied by the general issue, is held simply to admit some cause of action alleged, and that plaintiff is entitled to recover the amount tendered or confessed for such cause; but the tender or confession is no admission further than that: *Id.*

Defendant town elected no highway surveyors at its annual meeting, and the selectmen directed W. to act as a highway surveyor in his district, and he did so. They issued a warrant in common form, addressed to him as highway surveyor of said district, directing him to collect in labor the several taxes specified in his list, and defining the limits of his district, &c., which warrant he accepted and acted under through the year. And after he had caused all the taxes in said warrant to be expended in labor in said district, he purchased of D., for the town, a lot of stones to use in repairing a bridge in said district, and agreed upon the price of the same, as such surveyor, and the stones were taken and used accordingly. In a suit by D. to recover of the town the price of the stones, *Held*, that the town could not be heard to deny that W. was highway surveyor in said district, even though his appointment may not have been in writing, or his appointment and the certificate of his oath of office may not be recorded in the town records: *Id.*

The selectmen of a town, as its prudential officers, may appoint an agent to build or repair roads or bridges, in cases where by law it becomes their duty thus to build or repair as such selectmen: *Id.*

## PRACTICE.

*Admission of Persons not Parties to defend or prosecute.*—According to the practice in New Hampshire, any person who can satisfy the court that he has any rights involved in the trial of a cause, may be admitted to prosecute or defend the action: *Parsons v. Eureka Powder Works*, 48 N. H.

A person not the defendant in interest, but who has been admitted to defend an action, may properly be allowed, in the discretion of the court, to plead the Statute of Limitations: *Id.*

## RIVER.

*Change of Channel.*—When the channel of a river has been gradually changing for years, by wearing away the bank on the defendant's side, and by adding and forming accretions upon the opposite shore owned by plaintiff, by slow and imperceptible degrees, the channel as so changed must be regarded as the rightful and accustomed channel, for the time being, as between the different parties: *Gerrish v. Clough*, 48 N. H.

Such accretions become the property of the landowner upon that side of the river, and are as much entitled to protection as his original enclosure: *Id.*

In such case the defendant may protect his banks from further encroachment by rubbing or other means, provided it do not cause a change in the (then) accustomed channel of the river, to the material or appreciable injury of other riparian owners; but he has no right to build a dam, breakwater, or other obstruction in the stream, which will raise the water upon the plaintiff's land, or wash the same away: *Id.*

The questions in regard to the right of a *reasonable use* of the stream, or in regard to *ordinary care and prudence*, in erecting such dam or obstruction, do not arise in such case: *Id.*

SHIPPING. See *Admiralty*.

SUPREME COURT. See *Taxation*.

*Jurisdiction.*—This court cannot acquire jurisdiction of a cause through an order of a Circuit Court directing its transfer to this court, though such transfer be authorized by the express provision of an Act of Congress. Such provision must be regarded as an attempt, inadvertently made, to give to this court a jurisdiction withheld by the Constitution: *The Alicia*, 7 Wall.

In such a case, a notice to docket and dismiss must be denied, and this court will certify its opinion to the Circuit Court, for information, in order that it may proceed with the trial of the cause: *Id.*

TAXATION. See *Legal Tender Notes*.

*Certificates of Indebtedness.*—Where an act of a state legislature authorized the issue of bonds, by way of refunding to banks such portions of a tax as had been assessed on Federal securities made by the Constitution and statutes of the United States exempt from taxation, and the officers who were empowered to issue the obligations refused to sign them, because, as they alleged, a portion of the securities for the tax on which the bank claimed reimbursement was, in law, not exempt, and the highest court of the state sanctioned this refusal: *Held*, that

this was a decision by a state court against a right, privilege, or immunity claimed under the Constitution or a statute of the United States, and so that this court had jurisdiction under the 25th section of the Judiciary Act, and the amendatory Act of February 5th 1867: *The Banks v. The Mayor*, 7 Wall.

Certificates of indebtedness issued by the United States to creditors of the government, for supplies furnished to it in carrying on the recent war for the integrity of the Union, and by which the government promised to pay the sums of money specified in them, with interest, at a time named, are beyond the taxing power of the States: *Id.*

#### TRESPASS.

*Injury to Trespasser—Fence Laws.*—Every owner of property, before he can maintain an action to recover for injuries to it must show that he used reasonable and ordinary care and diligence, to protect it from injury: *Calkins v. Mathews*, 5 Kan.

While the legislature of this state, by enacting certain fence laws, and laws regulating the running at large of stock, have impliedly declared that such reasonable care and diligence with regard to real estate, shall be to fence it with a lawful fence, and that no action shall lie for injuries done by roaming cattle, unless such lawful fence is made; yet they have nowhere attempted to enact any law, giving to any person any right upon another's land, whether fenced or not; an act of that kind would tend to disturb vested rights, and be unconstitutional and void: *Id.*

It is not necessary, in order to enable a party to recover for injuries to his property, caused by the negligence of others, that he should be entirely free from all negligence himself; but if his negligence is slight, and that of the other party is gross, or if his is remote, and that of the other is the proximate cause of the injury, he may recover: *Id.*

It is a question of fact for the jury to determine, whether there has been negligence and its nature and degree, but it is a question of law, for the court to determine, what degree of care and diligence on the one side, and of negligence on the other, will entitle the plaintiff to recover: *Id.*

The plaintiff below allowed his horse to run at large. The horse wandered on to the unenclosed land of the defendant, and fell into an old well, which caused his death: *Held*, That the plaintiff cannot recover, unless the defendant was guilty of gross negligence in leaving the old well open: *Id.*

It was error for the court to charge the jury in such a case, that the defendant is liable, if through his failure to exercise ordinary care and prudence in the management of his land the horse was killed: *Id.*

*Title of Plaintiff.*—In an action for cutting down and carrying away timber, from a certain piece of land in the possession of the plaintiff below, who claims to be the owner thereof, and whose evidence of title is, 1st. A patent from the United States to an incompetent Wyandotte Indian, issued under article 4 of the treaty with the Wyandottes, of January 31st 1855; and 2d. A deed, not approved by the Secretary of the Interior, from said Wyandotte Indian to himself: *Held*, That the plaintiff may maintain the action. That although his title may be defective, yet while he is in possession, claiming to be the owner, and has color of title, no mere wrongdoer can dispute his title: *Nelson v. Mather*, 5 Kan.



## LIST OF NEW LAW BOOKS.

**ABBOTT.**—Digest of Reports of United States Courts and Acts of Congress to July 1868. By B. V. and A. ABBOTT. Vol. 4. New York: Diossy & Co. Shp. \$7.50.

**ANGELL.**—A Treatise on the Law of Watercourses. With an Appendix, containing Statutes of Flowing and Forms of Declarations. By JOSEPH K. ANGELL. 6th ed., with notes by J. C. PERKINS. Boston: Little, Brown & Co., 1869.

**ANGELL.**—A Treatise on the Limitations of Actions at Law and Suits in Equity and Admiralty. By J. K. ANGELL. 5th ed., by JOHN WILDER MAY. Boston: Little, Brown & Co., 1869.

**BATCHELDER.**—A Manual of the Laws of Massachusetts in relation to Manufacturing Corporations, together with a Summary of the Laws affecting Corporations generally in this Commonwealth, especially those organized for business purposes. By SAMUEL BATCHELDER, JR. Boston: Little, Brown & Co., 1868.

**CALIFORNIA.**—Digest of Reports and Statutes from the organization of the State to the present time. By CHAS. H. PARKER. 2 vols., 8vo., pp. 669 and 675. San Francisco: H. H. Bancroft & Co., 1869. For sale by T. & J. W. Johnson & Co., Philadelphia. Shp. \$20.

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THE LAW OF CONTRIBUTION.

THE doctrine of contribution may be defined as the rule by which one person, when compelled to discharge more than his share of any joint liability, can recover from those liable with him their aliquot proportion of the common burden. The justice of the rule is obvious, and is recognised by the codes of all civilized nations. The instances of its application under our law are numerous; but all depend on the fundamental principle that whenever persons are in *equali jure* a common liability is a common charge. They may, however, for the sake of convenience, be considered under three heads:—

- I. Contribution between joint debtors.
- II. Contribution between joint owners.
- III. Contribution between owners of contiguous property.

I. CONTRIBUTION BETWEEN JOINT DEBTORS.

The cases under this head may be divided into two classes:—

A. Co-sureties. B. Other joint debtors.

A. Contribution between sureties, unlike some other of the instances of the application of this doctrine, was originally enforced only by the courts of equity, the chancellors finding its germ in the Roman law, where, however, it existed in but a crude and imperfect form. By that law, a surety upon payment of the debt became entitled to the benefit of the doctrine of subrogation,

which, placing him in the position of the creditor, enabled him to enforce all the remedies of the latter as well against the principal as the other sureties. A cession of all such remedies would always be decreed by the court if refused by the creditor, the transaction being really more the sale than the payment of the debt. If, however, the surety failed to demand this cession, he had no remedy against his co-sureties, the theory of the law being that he obtained contribution, not by reason of any equity between him and the other sureties, and still less from any idea of an implied contract between them, but that he sued as creditor, to whose position he was subrogated, and for whom he was *procurator in rem suam*: Pothier, Obligations, p. ii. c. 6, § 7, Art. 4. This original harshness of the law was, however, modified to some extent by the plea or "exception" of division, introduced by the Emperor Adrian. The effect of this was that the court would decree a division of the debt between those sureties who were short, and thus restrict the demand of the creditor against the surety sued to his proportion only. If, however, as was the case with judicial sureties and sureties for debts due the state, this exception could not, or if in other cases it were not, pleaded, the surety paying the debt was still entitled to the benefit of the doctrine of subrogation: Pothier, Obligations, p. ii. c. 6, § 6, Art. 12.

The English courts of equity in adopting this remedy, briefly sketched above, from the Roman law, modified and enlarged it, basing it, not upon the narrow ground of subrogation, but upon the broadest principles of natural equity, that since the payment of the debt by one surety released all from their liability, the others *ought* to reimburse him to the extent of their respective shares: *Deering v. Winchelsea*, 2 Bos. & Pul. 270. *Qui sentire commodum sentire debet et onus*. The surety was still entitled to all collateral securities held by the creditor, but contribution was decreed entirely independent of the doctrine of subrogation, and based, as we have said, upon the simplest and broadest principles of natural equity.

The idea that contribution depends upon the theory of an implied contract between the sureties has, however, been advocated by some courts of law, who gradually assumed jurisdiction over the subject. It would seem, however, to have been thus advocated more to give jurisdiction and to overcome some technical objections to the *form* of the action, than from any idea that such an implied contract

actually exists (*Barry v. Ransom*, 2 Kern. (N. Y.) 467), since it is not consistent even with the rulings of the courts expressly advocating it: *Bachelder v. Fisk*, 17 Mass. 464. Lord ELDON, in *Craythorne v. Swinburne*, 14 Ves. 160, intimated that since the rule was so well understood, the sureties might be said to contract with reference to it; but it seems difficult, even in this modified form, to reconcile the doctrine with sound reason.

In case the sureties all became bound by the same instrument, or even by different instruments with the knowledge of one another, it might, perhaps, be said that they contracted with reference to this principle, and that each bound himself on the faith of the liability of the others. But this surely cannot be said when the liability of the sureties depends upon different instruments, and they become bound without any common knowledge; and yet it is well settled, both at law and in equity, that this is no bar to obtaining contribution: *Deering v. Winchelsea*, 2 Bos. & P. 270; *Cowell v. Edwards*, Id. 268; *Chaffee v. Jones*, 19 Pick. 260. And independent of this the object of the contract is simply to express the relations between the sureties and the creditor; it is made with *him*, for his benefit. How then can an entirely independent contract between the sureties themselves be implied therefrom? Again, where is the consideration to support such an implied contract? As we have seen, it cannot be said, except in a single case, that one surety binds himself, on the faith of the liability of the others. Neither can it be said that the law will raise an implied contract to contribute because the surety who paid the debt did what the others were legally bound to do, since this can only be applied to cases where one has paid what was solely the debt of another, and for which he was, as between themselves, only collaterally liable: *Jeffreys v. Gurr*, 2 B. & Ad. 833; *Pownall v. Ferrand*, 6 B. & C. 439; *Davies v. Humphreys*, 6 M. & W. 153. Exoneration by the principal is, indeed, based upon this doctrine, since here the surety has paid the debt of the former and not his own; but it cannot be applied between the sureties themselves, since these all stand in *equali jure*, all are equally liable, and the surety asking contribution has only paid his own debt. To reason as did the court of Massachusetts (*Bachelder v. Fisk*, *supra*), that since the action is *assumpsit* the right must rest on an implied contract, is reasoning in a circle, since the idea of an implied contract was first

advanced expressly to give a basis for this action of assumpsit. This is shown by the very case (*Birkley v. Presgrave*, 1 East 220) which the Massachusetts court cites to maintain its position, where the court decided that, since *ubi jus ibi remedium*, the action of assumpsit must be adapted to the case by a special count setting forth the facts.

The history of the adoption of this remedy by the common-law courts may serve still further to illustrate this point. As has been stated, the right was originally enforced only by the courts of equity, and was only adopted by the common-law courts within a comparatively recent period. There were indeed the common-law writs, *de contributione faciendâ inter cohæredes*, and *de feofementis*: Fitzherbert, *Natura Brevium* 162, b.; *Harbert's Case*, 3 R. 11 b.; but as their titles indicate, they were applicable only between joint owners of real property. The older reports contain many cases in which contribution between sureties or joint debtors was denied by the common-law courts: *Offley & Johnson's Case*, 2 Leond. 166; *Sir Wm. Whorwood's* and *Wormleighton and Hunter's Cases*, Godb. 243, and other cases cited in Viner's *Abr. tit. Surety*. One of the earliest instances of its recognition by the law courts is the case of *Layer v. Nelson*, decided in 1687, and reported in 1 Vernon 456, but even here it was declared to rest on a special custom of London, and that it could not be extended to cases in which the contract was made elsewhere. In 1787, it was said by BULLER, J., "the first case of the kind in which the plaintiff succeeded was before GOULD, J., at Dorchester:" *Touissant v. Martinant*, 2 T. R. 104.

Aside, therefore, from the fact that the idea that contribution between sureties depends upon an implied contract seems not to be founded in good reason, it would seem that the courts of law thus gradually adopting the remedy from equity, must have based it upon the same ground as that on which it there rested.

An implied contract may, however, be *assumed* in order to support the action at law, but no other consequence should be deduced from it: *Deering v. Winchelsea*, *supra*; *Barry v. Ransom*, *supra*; and this is practically the view even of those courts most strenuously advocating the notion of an implied contract, as in the Massachusetts case before cited (*Bachelder v. Fisk*, 17 Mass. 464), where the court was in the end, for the sake of con-

sistency with its own rulings, obliged to fall back on the maxim *ubi jus ibi remedium*.

Although the action may be thus maintained at law, equity is still the usual and better tribunal, Lord ELDON regretting that, owing to the necessary incompleteness of the remedy in the law courts, they ever assumed jurisdiction: *Cowell v. Edwards*, *supra*. Thus where one surety dies, contribution against his representatives cannot be obtained at law. The contract of the surety with the creditor is a personal one, and his death must necessarily terminate his liability; and it cannot be said, therefore, that the subsequent payment of the debt by another surety enured to the benefit of his estate: *Waters v. Riley*, 2 Har. & G. 305; *York v. Peck*, 14 Barb. 644. Equity, however, disregarding these technical objections, on account of the manifest hardship of the case, will decree contribution against the representatives of a deceased surety: *Simpson v. Vaughn*, 2 Atk. 33; *Primrose v. Bromley*, 1 Atk. 89. The rule in equity has also been held to be the rule of law by the courts of some states, which have no equity tribunals, on account of the necessity of the case: *Bachelder v. Fisk*, *supra*; *Riddle v. Bowman*, 7 Foster 236.

So in the case of the insolvency of one surety, complete relief cannot be obtained at law, since the remedy being several against each surety, the insolvent's share cannot be apportioned: *Brown v. Lee*, 6 B. & C. 689; *Chaffee v. Jones*, 19 Pick. 260. This difficulty not existing in equity, the insolvent's share will be there apportioned among all the other sureties: *Peters v. Rich*, 1 Ch. R. 34; *Holt v. Harrison*, Id. 240. The court of New Hampshire adopted this as the rule of law, on the same ground of necessity as in the case of a deceased surety: *Henderson v. McDuffie*, 5 N. H. 38.

This right of contribution not arising in favor of any surety till he has paid more than his share of the debt, is not barred by the discharge of any other by a certificate in bankruptcy. If the payment of the debt be made subsequently, the bankrupt's share is the same as any other debt contracted after his discharge; if made before it is provable against his estate, like any other debt. This is the rule under both the English and American acts: *Collins v. Prosser*, 1 B. & C. 682; *White v. Corbett*, 1 E. B. & E. 1103; *Dole v. Warren*, 32 Me. 94; *Dunn v. Spark*, 1

Carter 397; Hilliard on Bankruptcy, p. 323; James on Bankrupt Law of 1867, p. 142.

The payment of the debt upon which this claim for contribution is founded must have been made *compulsorily*. This does not mean, however, that it is necessary for the surety in all cases to delay until the creditor sues and obtains judgment against him; it is sufficient that upon default of the principal the creditor demand the debt of him, and he may thereupon pay and recover contribution from his co-sureties: *Cowell v. Edwards*, 2 Bos. & Pull. 268; *Bradley v. Burwell*, 3 Denio 61. This, indeed, would be his only proper course, for if he compelled the creditor to sue, the costs of the suit would fall solely upon himself, he having no right to demand contribution for an expense incurred in thus uselessly resisting a legal demand: *Knight v. Hughes*, 3 Car. & P. 467; *Henry v. Goldney*, 15 M. & W. 494. If, however, there be any valid defence, it would be the duty of the surety upon whom the demand is made to plead it, in all cases in which it would be hopeful and prudent for him to do so; and in the event of such defence proving unsuccessful, he could recover from his co-sureties their proportion of the costs, they being incurred for the common benefit: *Kemp v. Finden*, 12 M. & W. 421; *Fletcher v. Jackson*, 23 Vt. 593; *Davis v. Emerson*, 17 Me. 64. And, indeed, not to plead such defence would bar his claim to contribution, since the payment would then be regarded as having been made voluntarily.

With this exception it may be generally stated that contribution cannot be extended beyond the liability assumed by the sureties when making the contract with the creditor. Thus there can be no recovery of interest, since the right to compel contribution arising immediately upon payment of the debt by any surety, if he delay making the claim, he suffers for his own neglect: *Bell v. Free*, 1 Swanst. 90; *Bezoil v. Bowerbank*, 1 Campb. 50. The application of this rule must, however, be confined to the reasons upon which it is based. Thus if the remedy of the surety is, by reason of his co-surety's insolvency, practically worthless, there is authority for the statement that he may, when the latter becomes again solvent, recover from him his share of the debt with interest from the time of payment: *Swain v. Wall*, 1 Ch. R. 149.

This right of contribution affects only the relations of the sureties between themselves, and is entirely distinct from and inde-

pendent of the contract with the creditor, and cannot be modified by any act of his. Thus a surety, though discharged by the creditor, is still liable for his share of the debt in respect to contribution: *Ex parte Gifford*, 6 Vesey 805; Story's Eq., § 498 and note. The sureties may, however, between themselves, make any contract they please, and one surety may thus be exempted from all liability to contribute: *Swan v. Wall*, *supra*; *Craythorne v. Swinburne*, 14 Vesey 160; *Barry v. Ransom*, 2 Kern. 467. Such agreement may be either express or implied. Thus, if one surety enter into the original contract at the request of the others, there might as to him be an implied waiver of the right to contribution, and if compelled to pay the debt, he could recover the whole amount from his co-sureties. Parol evidence, as well of an express agreement as of such extrinsic circumstances, is admissible, it not being offered to vary the terms of a written contract, the object of that being simply to express their relations with the creditor: *Craythorne v. Swinburne*, *supra*, *Bradley v. Ransom*, *supra*, overruling GREY, J., in *Norton v. Coons*, 2 Selden 33.

If the surety paying the debt release any of his co-sureties, he could still compel the others to contribute their proportion, their liability to him being several and not joint: *Graham v. Robinson*, 2 T. R. 282; 23 Vt. 581.

The foregoing remarks, though made more especially with reference to sureties for the debt of another, apply to all contracts of indemnity. Thus in the case of double insurance, in the absence of the usual clause in the policy regulating this, any one set of underwriters compelled to pay the whole loss would have contribution against the others: *Newby v. Reed*, 1 W. Bl. 416.

**B. Other Joint Debtors.**—The principles already discussed with reference to co-sureties apply equally to joint debtors generally, this distinction having been made only for convenience. In the Roman law, however, there was a distinction in some respects between the two classes. Thus only sureties could plead the exception of division: Pothier Oblig., p. II. c. 6, § 6, Art. 2. Again, while the doctrine of subrogation applied equally to both, joint debtors, unlike sureties, could obtain contribution without subrogation, by means of the *actio pro socio*: Pothier Oblig., p. II., c. 3, Art. 8, §§ 5 and 6.

*Contribution between Wrongdoers.*—This is the only exception



to the general rule that contribution will always be decreed whenever one person pays more than his share of any joint liability, both law and equity denying relief to one whose claim must be based on his own wrong: *Merryweather v. Nixon*, 8 T. R. 186 (Smith's L. C.). This must, however, be confined to the reasons upon which it is based, and can therefore only be applied to cases of actual *moral* wrong, or where the act was wilfully committed and known to be illegal: *Wooley v. Batte*, 2 Car. & P. 417; *Adamson v. Jarvis*, 4 Bing. 66; *Bailey v. Bussing*, 28 Conn. 455; *Horbach v. Elder*, 18 Penna. 83. *Ignorantia juris non excusat*, but here the plaintiff does not seek to escape from his liability, but only asks that those equally responsible with him for the injury should bear their proportion of the penalty. Where the tort was committed by the servant of several persons, while employed in the common service, and one master is sued, it is clear that the reason of the rule denying contribution between wrongdoers does not apply: *Worley v. Batte*, *supra*; *Horbach v. Elder*, *supra*.

## II. CONTRIBUTION BETWEEN JOINT OWNERS.

A. *Between Joint Owners of Chattels*.—One joint owner of a chattel cannot, as a general rule, compel the others to contribute towards expenses incurred by him in making repairs or improvements on the common property, unless made with the consent of such other owners. This consent, however, need not be express, but may be implied from circumstances; as in the case of animals, the owners of which may always be presumed, unless there be special circumstances, to desire that they should be fed and sheltered; the owner may also in many other cases be regarded as agent for all: *Story on Part.* § 414; *Steamboat New Orleans v. Phœbus*, 11 Peters 175. The subject is usually discussed with reference to part owners of ships, and many questions of interest are involved not strictly falling within the limits of this article.

B. *Contribution between Joint Owners of Real Estate*.—Contribution between joint owners of real estate, while based upon the same equitable principles as in the cases already considered, is not so exclusively a creature of chancery, the common law providing the means for its enforcement. Contribution may be enforced by one joint owner of real estate against another in two cases.

(1). *For expenses incurred in making repairs on a house.*—In regard to repairs or improvements made by one joint owner of real estate, the general rule is the same as in the law of personal property: *Bowles's Case*, 11 R. 82 b; *Taylor v. Baldwin*, 10 Barb. 582. An exception was, however, made by the common law in favor of joint owners of houses and mills; one tenant, in case his co-tenant refused to join him in making necessary repairs, being enabled to compel him so to do by means of the writ *de reparatione faciendâ*: Fitzherbert's *Natura Brevium* 162 b; Co. Litt. 200 b. This writ was, according to Lord COKE, based upon reasons of public policy, the owners being "bound, *pro bono publico*, to maintain houses and mills which are for the habitation and use of man:" Ibid.; and it is upon this ground, and because such property cannot be conveniently partitioned, that the action now rests: *Doane v. Badger*, 12 Mass. 65; *Mumford v. Brown*, 6 Cowen 475. The expenses of all other improvements upon land held jointly must be borne solely by the person making them, the improvements themselves ensuring to the benefit of the estate. A court of equity will, however, when decreeing partition, assign to the tenant who made the improvements that part of the estate upon which they were made, or make some other equitable arrangement: *Town v. Needham*, 3 Paige 546; *Green v. Putnam*, 1 Barb. 507.

(2). *Contribution to redeem an estate from a mortgage or other lien.*—At the common law, the writs *de contributione* would always lie where lands held jointly were charged with a suit which the lord sought to enforce against one tenant solely. These writs were founded on the Statute of Marlebridge, 52 H. 3, c. 9, which provided, "if any inheritance, whereof but one suit is due, descends unto many heirs as with parceners, whoso hath the eldest part of the inheritance shall do the suit for herself and fellows, and the others shall be contributaries according to their portions." With respect to feoffees, there could not, from the nature of the case, be any statutory provision as to who should do the suit, and it was therefore left to the agreement of the parties; if they could not agree, the lord could sue any one, who could compel the others to come in and defend with him by means of an *audita querela*: Fitzherbert's *N. B.* 162 b.; *Harbert's Case*, 3 R. 11 b. These writs were commonly used when lands were charged with the payment of an ancestor's or grantor's debt by recognisance or statutes

merchant, and many instances of this application are given in *Harbert's Case*, 3 R. 11 b. This case declared what may be regarded as the fundamental principle of contribution, that whenever persons stand in *equali jure*, they must bear, rateably all burdens. Another principle equally fundamental is that in the case of a mortgage the debt is the principal, and the land only collateral security for its payment. On these two principles depends the modern law of contribution to redeem a mortgage. It may, perhaps, be more conveniently discussed under two divisions.

(a). With reference to grantees.

b). With reference to heirs or devisees.

(a). If the mortgagor alien his whole estate to different purchasers by deeds taking effect simultaneously, the purchasers would then all stand in *equali jure*, and would contribute rateably towards the redemption. If, however, the mortgagor alien only part of his estate, the portion retained by him is primarily liable, the debt being the principal. If, now, he grant this remainder of the estate to a second purchaser, the portion thus subsequently granted would still be primarily liable, as such second grantee would take the estate as his grantor had it, or, to state the rule in its usual form, "the lands are charged in the inverse order of alienation." This rule, the justice of which was ably vindicated by Chancellor KENT (*Cheeseborough v. Millard*, 1 Johns. Ch. 409), may now be regarded as settled law in most of the states.<sup>1</sup> The only question is, do the parties stand in *equali jure*? Clearly they do not. The first purchaser buys, as he supposes, an unencumbered estate. The second stands in the position of his grantor, and can no more compel the first to contribute than could the grantor himself.

(b). The case of heirs or devisees presents no difficulty. All stand in *equali jure*, and any one compelled to pay the whole debt in order to save his estate, is subrogated to the position of the mortgagee, and holds the mortgage as equitable assignee till the others redeem by contributing their proportions.

A tenant for life is bound to assume only those burdens which enure to the benefit of his estate. Thus, he must pay taxes, they

<sup>1</sup> See *Cowden's Estate*, 1 Penna. St. 267, where the subject is discussed by KENDRICK, J., and the authorities cited by Story's Eq., § 1233 b, in opposition to the rule are shown to have no application, with perhaps an exception: 1 Younge & Colyer Ch. 401.

being imposed for yearly benefits; but he can obtain contribution from the reversioner for assessments imposed for permanent improvements: *Cairns v. Chaubert*, 3 Edw. Ch. 312. He is therefore obliged to pay only the interest of encumbrances while his estate lasts, and contribution between him and the reversioner on redemption is based upon this principle. The old rule was that he should pay one-third of the debt (*Flud v. Flud*, Freeman 210), but the more exact modern rule is that he pays "what the present worth of annuity equal to the interest would amount to computed for as many years as he has chances of life, as given by the annuity tables:" 1 Washburn Real Prop., p. 917. A dowress of course pays an amount equal to one-third of the interest, ascertained by the same rule.

As between an heir and a devisee, the lands not disposed of by will are primarily liable, "the heir sitting in the seat of his ancestor:" *Graham v. Dickinson*, 3 Barb. Ch. 169.

### III. CONTRIBUTION BETWEEN OWNERS OF CONTIGUOUS PROPERTY.

Contribution may in some cases be enforced between owners of contiguous property, or of personal property subjected to a common risk, when an act is done by one for the common benefit. The only instance of this in the law of personal property is the rule known as

A. *General Average*.—When property on the sea is in danger of destruction in consequence of some marine peril, and a sacrifice of some part of such property is voluntarily made for the purpose of saving the remainder, the property thus saved contributes by this rule its proportion of the loss sustained by the owner of that sacrificed. The justice of this rule is obvious, and its "wisdom and equity will do honor to the state from which it has been derived as long as maritime commerce shall endure:" Abbott on Shipping, p. 605. Its origin was the ancient law of Rhodes, and from thence it was adopted into the Roman law. One of the earliest reported cases in the English law is that of *Hicks v. Pakington*, F. Moore 297 (22 Eliz.), where it is stated as a rule of the civil law. It was, however, recognised long anterior to this, as shown by the message sent by Edward I., A. D. 1285, to the Cinque Ports: Rymer Fœdera, p. ii. p. 654.

There are three essentials to bring a loss within this rule: It

must have been voluntary, necessary, and successful. Anciently, when a jettison of goods was made, it was usual for the master to consult with his crew as to its propriety, but this rule is abrogated by modern law. It was never considered absolutely essential to the bringing of a loss within the rule, but was merely considered as furnishing good evidence of its necessity: *Abbott on Shipping*, p. 471. In cases of extreme danger, there being no time for such consultation; the imminency of the peril would justify an "irregular" jettison: *Ibid.*

All property saved, whether ship, cargo, or freight, contributes towards the average; and, if either be sacrificed, the loss constitutes a claim for contribution. By the Rhodian law, even the effects and clothes of those on board contributed, nothing being excepted save provisions and instruments for the defence of the ship (3 Kent Com. p. 240); and such was also the rule of the old English law.<sup>1</sup>

In estimating the value upon which this contribution is to be based, the ship's value at the time she was lost is estimated by the aid of the best available evidence (*Simonds v. White*, 2 B. & C. 805), although various rules for approximation have been proposed: 1 Caines 573; 2 S. & R. 229. The cargo is valued at the net price it would have yielded at the port of discharge: *Rogers v. Mech. Ins. Co.*, 1 Story 609. The value of the ship's equipments is considered as being two-thirds of their original value: *Strong v. N. Y. Fire Ins. Co.*, 11 Johns. 323.

It would seem that expenses incurred in seeking repairs should fall within the rule, they being for the benefit of cargo and ship: *Padelford v. Boardman*, 4 Mass. 548; *Greeley v. Tremont Ins. Co.*, 9 Cush. 421.

*B. Contribution between Owners of Contiguous Real Estate.*—At the common law, there was the writ *de domo reparanda*, by which a tenant of one part of a house to compel a tenant of another part to repair that part in which he lived. Thus, the tenant of the lower part could compel the tenant of the upper to repair the roof. Several instances of its application are reported, although its exact extent is not well settled: *Fitzherbert*, N. B.

<sup>1</sup> See cases cited in Vin. Abr., tit. *Contribution and Average*. The message of Edward I., cited above, enumerates the following among the articles liable to contribute: "Mouile, zona et ciphus argenteus, et anulus magistri navis, in digito suo portatus."

127; *Keilway* 98; 11 Mod. 7; *Tenant v. Goldwin*, 2 Ld. Raymond 1089. It was said by PARSONS, C. J., that it would still lie, but this appears doubtful: *Loring v. Bacon*, 4 Mass. 575; *Cheeseborough v. Greene*, 10 Conn. 318. It was not, however, a writ of contribution, the expense of the repairs falling solely on the defendant. Equity will now, however, consider all such expenses as a common charge, since both tenants share in the benefit: *Campbell v. Mesier*, 4 Johns. Ch. 334; 10 Conn. 318. The subject is, however, usually regulated by statute.

**Party-walls.**—Whenever a party-wall is in need of repairs, and one owner refuses to join the other in making them, equity will, in the absence of any statutory regulation, compel the former to contribute his share of the expense. This was the rule of the civil law (Domat, Civil Law, B. I., tit. 12, § 4), and is well established as the rule in equity: *Campbell v. Mesier*, 4 Johns. Ch. 334; *Partridge v. Gilbert*, 15 N. Y. 601; *Sherrerd v. Cisco*, 4 Sandf. (N. Y. Superior Ct.) 480. Chancellor KENT extended the rule to a case where the wall being in a ruinous condition, was torn down and rebuilt (*Partridge v. Gilbert*, *supra*); but the validity of this application has been doubted in 15 N. Y. 601, and 4 Sandf. 480. These cases differed somewhat from *Campbell v. Mesier*, and cannot be regarded as overruling it. In these cases the buildings were destroyed by fire, and the easement in the wall was of course extinguished by its destruction. And since one owner could not compel the other to rebuild, the reciprocity of obligation, which is the necessary basis of a claim for contribution, no longer existed. Where, however, as in *Campbell v. Mesier*, in repairing a wall it is found to be so ruinous that it is necessary to tear it down and rebuild, the case only differs from ordinary repairs in the fact of their being more extensive.

**Division Fences.**—This case is usually regulated by statute, but aside from this, equity would always decree contribution, whenever the erection of such fences could be regarded as a benefit to both estates. Thus, it is an equal benefit to a railroad company, and to the owner of the contiguous land, that the cattle of the latter should not stray upon the road. In the absence, therefore, of statutory regulations, equity would consider the expense of building a division fence between the road and the contiguous land as constituting a common charge: *In the Matter of the Rens. and Saratoga Railroad*, 4 Paige 556.

## RECENT AMERICAN DECISIONS.

*Supreme Court of Pennsylvania.*

JAMES C. VAN DYKE ET AL. v. ELIZABETH VAN DYKE ET AL.

Although a will may be ineffectual to pass land in another state, because not attested by subscribing witnesses, yet an heir at law to whom a legacy is given from the testator's Pennsylvania estate, the will being valid in this state, will be put to his election, and will not be permitted to claim the gift without giving assent to everything contained in the instrument.

The English rule that cases in which a legacy is given by an unattested will upon the *express* condition that the legatee shall give up his claim to real estate devised away from him, are to be distinguished from those in which such a condition is clearly *implied*, rests upon no sufficient reason, and cannot be satisfactorily explained. The clear intention of a testator should not be frustrated upon authorities establishing a distinction without any difference.

The doctrine of equitable election is grounded upon the ascertained intention of the testator, and the court can resort to every part of the will to arrive at it, in construing a bequest within its rightful jurisdiction.

Equitable election rests upon the principle of compensation; and not of forfeiture, which applies only to the non-performance of an express condition.

Courts of equity in Pennsylvania have jurisdiction in cases of election on the ground of *trust*; although the case arises under a will, and bears incidentally upon the settlement of a decedent's estate. The jurisdiction of the Orphans' Court is concurrent, but not exclusive.

ON appeal in equity from a decree of the Court of Nisi Prius.

Dr. Frederick A. Van Dyke, a citizen of Pennsylvania, domiciled in Philadelphia, died, leaving a will which was duly admitted to probate in Philadelphia.

The decedent was owner of personal estate, and of real estate in Pennsylvania and also in New Jersey.

By his will he gave to his daughters legacies to be paid from his estate in Pennsylvania (which nearly exhausted it), and devised the residue of his Pennsylvania estate, and his lands in New Jersey (particularly describing them), to his sons, in equal shares.

The will, having no subscribing witness, was ineffectual to pass lands in New Jersey, and as to the testator's real estate there, he died intestate, and his daughters take in equal shares with his sons.

This was a bill filed on behalf of the sons, alleging that the testator meant to exclude all but his sons from his New Jersey property; and that he intended that his daughters should take no more than the legacies he had bequeathed to them. The prayer

was that they might be put to their election, either to give effect to the whole will by relinquishing their claim to the New Jersey property; or, from their legacies, to compensate the sons for their loss in consequence of the daughters sharing with them the New Jersey property.

No issue of fact was raised by the answers, and the question which came before the court was simply whether the legatees were bound to elect.

*E. Coppée Mitchell and Edward Olmsted, for appellants.*

*C. E. Morgan and William A. Porter, for appellees.*

The opinion of the court was delivered by

SHARSWOOD, J.—No question has been made *by the parties* as to the jurisdiction of a court of equity in this state to give the relief prayed for in this bill. It having been suggested that it would be an encroachment upon that which by the Acts of Assembly is exclusively conferred upon the Orphans' Court, the attention of the counsel was directed to this point when the cause was ordered for reargument. The learned and able gentlemen retained for the defendants have, however, frankly conceded it. Consent, indeed, cannot give jurisdiction, and it is therefore deemed proper to say that we entertain no doubt upon the subject. The Orphans' Court, by the Act of June 16th 1836, § 19, Pamph. L. 792, has jurisdiction of proceedings for the recovery of legacies—of the settlement of the accounts of executors—the distribution of the estates of decedents—and in all cases wherein executors may be possessed of or in any way accountable for any real or personal estate of a decedent. It is also the settled doctrine that the jurisdiction of that court within its appointed orbit is exclusive: *Whiteside v. Whiteside*, 8 Harris 478; *Shollenberger's Appeal*, 9 Harris 337; *Black v. Black*, 10 Casey 354; and, no doubt, a court of equity cannot interfere with a matter of which the Orphans' Court has exclusive jurisdiction: *Loomis v. Loomis*, 8 Casey 283; *Biddle v. Bickley*, 9 Casey 276. But it is not in every case which may incidentally bear upon the settlement of the estate of a decedent that its jurisdiction is exclusive; otherwise all remedies for the recovery of claims against such estate would necessarily be drawn within its vortex. This has never been pretended: *McLean's Executors v. Wade*, 3 P. F. Smith 145; *Sergeant's Executors v. Ewing*, 6



Casey 75. This is not a proceeding to recover a legacy charged on land, nor to compel a settlement or distribution, but falls within the admitted scope of the authority of a court of equity in cases of trust. The legal title being in the defendants as heirs at law, that court, if it is a case of election, holds them bound, as trustees, to compensate the devisees disappointed of the bounty intended for them by the testator. The jurisdiction in such a case is expressly recognised as concurrent in *Lewis v. Lewis*, 1 Harris 79. The decree of this court will doubtless be conclusive as to the subject-matter upon the final settlement of the accounts of the executors, but so would a judgment against them in a court of law, if no fraud or collusion were shown. We pass therefore to the main question.

It may certainly be considered as settled in England, that if a will purporting to devise real estate, but ineffectually because not attested according to the Statute of Frauds, gives a legacy to the heir at law, he cannot be put to his election: *Hearle v. Greenbank*, 3 Atk. 695; *Thellusson v. Woodford*, 13 Ves. 209; *Buckridge v. Ingram*, 2 Ves. Jr. 652; *Sheddon v. Goodrich*, 8 Ves. 482. These cases have been recognised and followed in this country: *Melchor v. Burger*, 1 Dev. & Batt. Eq. 634; *McElfresh v. Schley*, 1 Gill 181; *Jones v. Jones*, 8 Id. 197; *Kearney v. McComb*, 1 C. E. Green 189. Yet it is equally well established that if the testator annexes an express condition to the bequest of the personalty, the duty of election will be enforced: *Boughton v. Boughton*, 2 Ves. 12; *Whistler v. Webster*, 2 Ves. Jr. 652; *Ker v. Wauchope*, 1 Bligh 1; *McElfresh v. Schley*, 1 Gill 181. That this distinction rests upon no sufficient reason has been admitted by almost every judge before whom the question has arisen. Why an express condition should prevail, and one however clearly implied should not, has never been and cannot be satisfactorily explained. It is said that a disposition absolutely void is no disposition at all, and being incapable of effect as such, it cannot be read to ascertain the intent of the testator. But an express condition annexed to the bequest of the personalty does not make the disposition of the realty valid: it would be a repeal of the Statute of Frauds so to hold. How then can it operate any more than an implied condition to open the eyes of the court so as to enable them to read those parts of the will which relate to the realty—and without a knowledge of what they are, how can

the condition be enforced? "As to the question of the election," said Lord KENYON, while Master of the Rolls, "the cases which have been cited are certainly great authorities; but I must confess I should have great difficulty in making the same distinctions if they had come before me. They have said you shall not look into a will unattested so as to raise the condition which would be implied from the devise if it had appeared; but if you give a legacy on condition that the legatee shall give the lands, then he must elect. However, I am bound by the force of authorities to take no notice whatever of the unattested will, as far as relates to the freehold estate:" *Carey v. Askew*, 1 Cox 241. "I do not understand," said Sir WILLIAM GRANT, "why a will, though not executed so as to pass real estate, should not be read for the purpose of discovering in it an implied condition concerning real estate annexed to a gift of personal property; as it is admitted it must be read when such condition is expressly annexed to such gift. For if, by a sound construction, such condition is rightly inferred from the whole instrument, the effect seems to be the same as if it was expressed in words:" *Brodie v. Barry*, 2 Ves. & Bea. 127. So Lord ELDON declared that "the distinctions upon this head of law appear to be rather unsubstantial," and that "these are undoubtedly thin distinctions, and a judge having to deal with them, finds a difficulty in stating to his own mind satisfactory principles on which they may be grounded:" *Ker v. Wauchope*, 1 Bligh 1. And in another place: "The reason of that distinction, if it was *res integra*, is questionable." "With Lord KENYON, I think the distinction such as the mind cannot well fasten upon:" *Sheddon v. Goodrich*, 8 Ves. 482.

Mr. Justice KENNEDY has expressed the same opinion. "When a condition is necessarily implied by a construction in regard to which there can be but one opinion, there can be no good reason why the result or decision of the court should not be the same as in the case of an express condition, and the donee bound to make an election in the one case as well as the other:" *City of Philadelphia v. Davis*, 1 Whart. 510.

There is another class of cases in England wholly irreconcilable with this shadowy distinction; for the heir at law of a copyhold was formerly put to his election, though there had been no surrender to the uses of the will. This was previous to 55 Geo. III. c. 192: 1 White & Tudor's Leading Cas. 239 note. Yet as

Sir WILLIAM GRANT has remarked: "A will, however executed, was as inoperative for the conveyance of copyhold, as a will defectively executed is for the conveyance of freehold estate:" *Brodie v. Barry*, 2 Ves. & B. 130.

The mind instinctively shrinks from the task of frustrating the clear intention of a testator, aiming, too, to make all his children equal, upon authorities establishing a distinction without any difference. The precise point can never arise in this state, for happily our Statute of Wills of April 8th 1833, Pamph. L. 249, wisely provides that the forms and solemnities of execution and proof shall be the same in all wills, whether of realty or personalty. The case before us is of a will duly executed according to the law of Pennsylvania, devising lands in New Jersey, where, however, it is invalid as to the realty by not having two subscribing witnesses. A court of New Jersey might hold themselves on these authorities bound to shut their eyes on the devise of the realty, and consider it as though it were not written. And so they have held: *Kearney v. Macomb*, 1 C. E. Green 189. They might feel themselves compelled to say, with Lord ALVANLEY, however absurdly it sounds: "I cannot read the will without the word 'real' in it; but I can say, for the statute enables me, and I am bound to say, that if a man, by a will unattested, gives both real and personal estate, he never meant to give the real estate:" *Buckridge v. Ingram*, 2 Ves. Jr. 652. But a statute of New Jersey has no such moral power over the conscience of a court of Pennsylvania to prevent it from reading the whole will upon the construction of a bequest of personalty within its rightful jurisdiction. If a question could arise directly upon the title of the heirs at law to the New Jersey land, doubtless the courts of any other state, upon the well-settled principles of the comity of nations, must decide it according to the *lex rei sitæ*. We are dealing only with the bequest of personalty, and the simple question is, whether the testator intended to annex a condition. If, without making any disposition whatever of the New Jersey estates—dying intestate as to them—he had annexed an express proviso to the legacies to his daughters that they should release to their brothers all their right and title as heirs at law to these lands,—it is of course indubitable that such a condition would have been effectual. We are precluded by no statute to which we owe obedience from

reading the whole will, and, if we see plainly that such was the intention of the testator, from carrying it into effect.

Some cases have arisen in England upon wills disposing of English and Scotch estates, in which the judgments have not been harmonious, nor can any general principle be extracted from them bearing upon this question. In *Brodie v. Barry*, 2 Ves. & Bea. 127, an heir at law of heritable property in Scotland, being also a legatee under a will not conforming to the law of Scotland as to heritable property, was put to his election. By that law, a previous conveyance by deed was necessary, according to the proper feudal forms, upon which the uses declared by the will might operate. As by the law of Scotland the heir at law in such a case was put to his approbate or reprobate (the Scotch law term for election), and it was very similar to a will of copyhold, Sir WILLIAM GRANT, considering the law of both countries to be the same, felt himself freed from the necessity of determining by which law the decision should be made. *Dundas v. Dundas*, 2 Dow & Clark 349, was a case in the House of Lords from Scotland. The will was formal, according to the Scotch law, but was invalid as to real estate in England, under the Statute of Frauds. Yet the decision of the Court of Session putting the English heir at law to his approbate or reprobate, was affirmed. This case is certainly in point in favor of the position taken in this opinion. It is true, that in the judgment pronounced by Lord Chancellor BROUGHAM—then but recently raised to the woolsack—it is not put on that ground. He assumes that in England, while a court of law would be precluded by the statute from looking at the disposition made of the realty, it was competent for a court of equity to do so; and that the Court of Session in Scotland had only done what a chancellor in England had a right to do; a distinction, it must be allowed, not doubted in any of the previous cases, which were all in courts of equity.

In *McCall v. McCall*, Drury 283, Lord Chancellor SUGDEN held that an heir at law of heritable property in Scotland, who was also the devisee of real estate in Ireland, under a will duly executed as to the Irish, but ineffectual as to the Scotch estate, was bound to make his election. In the late case of *Maxwell v. Maxwell*, 13 Eng. L. & Eq. Rep. 443, which arose in England, the heir at law in Scotland was not put to his election, but distinctly on the ground that the will, in the alleged disposition of

the Scotch estate, had used only general words. "If the will had mentioned Scotland in terms," said Sir KNIGHT BRUCE, Lord Justice, "or the testator had not any real estate, except real estate in Scotland, that might have been a ground for putting the heir to his election. The matter, however, standing as it does, we are bound to hold that the will does not exhibit an intention to give or affect any property which it is not adapted to pass." And Lord CRANWORTH concurred in this view.

In this state of the authorities, we are clear in holding that we are not precluded by force of the New Jersey Statute of Frauds from reading the whole will of the testator in order to ascertain his intention in reference to the bequests of personalty now in question. We are equally clear that it is a case of election. The intention of the testator does not rest merely upon the implication arising from his careful division of his property among his children in different classes, but he has indicated it in words by the clause, "I direct and enjoin on my heirs that no exception be taken to this my will or any part thereof on any legal or technical account." It is true that for want of a bequest over, this provision would be regarded as *in terrorem* only, and would not induce a forfeiture: *Chew's Appeal*, 9 Wright 228. But, as has been often said, the equitable doctrine of election is grounded upon the ascertained intention of the testator, and we can resort to every part of the will to arrive at it. "The intention of the donor or testator ought doubtless to be the polar star in such cases," says Mr. Justice KENNEDY, "and whenever it appears from the instrument itself conferring the benefit, with certainty that will admit of no doubt, either by express declaration or words that are susceptible of no other meaning, that it was the intention of the donor or testator that the object of his bounty should not participate in it without giving his assent to everything contained in the instrument, the donee ought not to be permitted to claim the gift, unless he will abide by the intention and wishes of its author:" *City of Philadelphia v. Davis*, 1 Whart. 510.

This, however, is not the only mode in which the equity of the case can be reached. The doctrine of equitable election rests upon the principle of compensation; and not of forfeiture, which applies only to the non-performance of an express condition: 2 Madd. Ch. 49. Besides, no decree of this court could authorize the guardians of the minors to execute releases of their right and

title to the New Jersey land which would be effectual in that state. The alternative decree prayed for in the bill is that which is most appropriate to the case.

Decree reversed; and decree entered that the executors of F. A. Van Dyke, deceased, shall pay to the defendants such sum less than the amount of their respective legacies as will compensate the plaintiffs for the value of the shares of the said legatees in the said real estate in New Jersey; and that it be referred to a master to settle and report such respective amounts.

The English Statute of Frauds required that a will of lands should be executed in the presence of three subscribing witnesses, or else "be utterly void and of none effect." In construing this statute, the courts have laid down two principles, which seem to be almost identical, but yet are susceptible of very widely different application.

1. That, since every man is presumed to know the law, where a testator devised lands by a will not executed and attested as required by the statute, *he never intended* to have the devise take effect: *Buckridge v. Ingram*, 2 Ves. 652.

2. That, since the law required a devise of lands to be proved by evidence of a certain character and solemnity, the courts were precluded from taking notice of the devise unless the proper evidence of it were produced. Or, in other words, *they could not read the will*: *Thelluson v. Woodford*, 13 Ves. Jr. 209.

The first of these principles is founded on a maxim which is not true in fact, and which, in cases of wills, is not brought into operation. The rules of construction applied to wills are much less strict than those applied to deeds, because testators are frequently *inopes consilii*, and ignorant of the law, and this has been so from a very early period. Executory devises have been supported, where as remainders they would have fallen; and words are sufficient to pass an estate of inheritance,

if used in a will, which, if found in a deed, would create only a life estate. Certainly, then, nothing could be more absurd than, upon the strength of such a maxim, to say that a testator did not mean what he has solemnly and clearly expressed in writing as the last act of his life, because he has omitted to have the required number of witnesses who subscribed their names as such, or some other technical and formal requisite.

2. The second principle above mentioned reduces the matter to a question of evidence. Where the will is so executed and attested as to be properly received and read in evidence before the court, it has never been doubted that those who receive benefits thereby will be held to give effect to every part thereof. Now, a writing could have been received in evidence by the court when considering a contract or a bequest relating to personality, which was not sufficient evidence to affect real estate under the statute: and, once in evidence, every part of it might certainly be looked at in arriving at the intention of the framer of it as to the matter in hand, i. e. the personal property.

The anomaly in the English law, which has been followed in this country, and which is exposed and overruled in the foregoing decision, was introduced by Lord HARDWICKE in 1749, in *Hearl v. Greenbank*, 1 Ves. Sr. 298, where he seems to have been led away

by the very strong and positive words of the statute, "utterly void and of none effect," and to have given his decision of the point without fully examining, and certainly without fully stating, the reasons upon which he grounded it. In the following year, 1750, the same chancellor decided the case of *Boughton v. Boughton*, 2 Ves. Sr. 12, which was also a question of election arising upon a will not sufficiently attested, and there he undertook to give the reasons for his judgment in *Heal v. Greenbank*; and drew the distinction between an express condition that those claiming benefit by the will should suffer the whole of it to take effect, and a similar condition implied from the evident intention of the testator. "If there is such a condition (express) annexed to a personal legacy, the court must consider every part

of that, whether it is a matter relating to real estate or not. You must read the whole will relating to the personal legacy, let it relate to what it will; which is a substantial difference, and will prevent going too far to break in upon the Statute of Frauds, and at the same time will attain natural justice, which requires, as far as may be, such a construction to be made, otherwise the intent of the testator may be overturned."

It is to be regretted that the laws of evidence in states bordering upon each other should be so widely different as to give rise to cases like *Van Dyke v. Van Dyke*. The statute of New Jersey requires two subscribing witnesses to a will—that of Maryland three—and in the intermediate state of Pennsylvania a will is good without any subscribing witness at all.

E. C. M.

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*United States District Court. District of New Jersey.  
In Admiralty.*

ALONZO JACKSON ET AL., LIBELLANTS, v. STEAM PROPELLER  
KINNIE.

State statutes authorizing actions *in rem* against vessels for causes cognisable in admiralty are statutes conferring admiralty jurisdiction, and are therefore unconstitutional.

A lien created by a state law against a domestic vessel for supplies furnished in a home port cannot be recognised or enforced in a court of admiralty.

THIS was a libel for seamen's wages. The Hoboken Coal Company, intervening for their own interest, contested the libellants' demands, and claimed to have a lien upon the vessel for supplies furnished. A reference was made to a commissioner to hear the proofs and allegations of the parties.

*Hamilton and Wallis*, for libellants.

*Jonathan Dixon, Jr.*, for intervenors.

FIELD, D. J.—It is insisted by the libellants that the Hoboken Coal Company have no standing in court, that they have no lien upon this vessel which a court of admiralty will recognise or enforce, and that consequently they have no right to intervene for their own interest, or to contest the claims of the libellants.

It is admitted that the propeller was owned in this state, that the intervenors were a corporation organized and carrying on business in this state, and that the supplies were furnished in this state. It is a case then of a domestic vessel, and supplies furnished in a home port. By the maritime law of continental Europe, no distinction is made between the cases of domestic and foreign ships, nor between supplies furnished in a home port and abroad. But by the maritime law of England and of this country, supplies furnished to a domestic vessel, in a home port, are presumed to be furnished on the personal credit of the owner or master, and do not create a lien, which can be enforced in a court of admiralty by proceedings *in rem*.

But the intervenors claim to have a lien upon this vessel, in virtue of an Act of the Legislature of New Jersey, approved March 20th 1857. The title of the act is, "An act for the collection of demands against ships, steamboats, and other vessels:" 4 Nixon's Dig. 576. The act, with the supplement thereto, approved March 18th 1858, provides that, "Whenever a debt amounting to \$50 or upwards shall be contracted by the master, owner, agent, or consignees of any ship or vessel within this state, for either of the following purposes, namely, on account of any work done, or materials or articles furnished in this state, for or towards the building, repairing, fitting, furnishing, or equipping such ship or vessel, or for wharfage and the expenses of keeping such vessel in port, including the expense incurred in employing persons to watch her, such debt shall be a lien upon such ship or vessel, her tackle, apparel, and furniture, and shall be preferred to all other liens thereon, except mariners' wages." The act then proceeds to make provision for enforcing this lien. Application may be made to a Supreme Court commissioner for a warrant, to be directed to the sheriff, or a constable, or in their absence, to any coroner of the county, commanding him to attach, seize, and safely keep said ship or vessel to answer such lien. Notice of the issuing of the warrant is to be published in a newspaper printed in the county, and unless the lien is satisfied, or



the warrant discharged, the ship or vessel is to be sold, and the proceeds to be distributed in the manner directed by the act.

Is this Act of the Legislature of New Jersey, so far as it authorizes proceedings *in rem* against a ship or vessel, in violation of the Constitution of the United States; and is the lien thereby attempted to be created one which a court of admiralty will recognise or enforce? The Constitution declares, in the 2d section of the 3d article, among other things, that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." And the 9th section of the Judiciary Act of 1789 provides that the District Courts of the United States shall have exclusive original jurisdiction of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it. It will be seen, therefore, that the jurisdiction of the District Courts of the United States, over all admiralty and maritime causes, is exclusive, with the exception of such concurrent remedy as is given by the common law.

There is eminent wisdom and propriety in giving to the courts of the United States exclusive jurisdiction in such cases. "The most bigoted idolizers of state authority," said the Federalist, "have not thus far shown a disposition to deny the national judiciary the cognisance of maritime causes. These so generally depend on the law of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace:" The Federalist, No. 80.

"The admiralty jurisdiction," says Judge STORY, "naturally connects itself, on the one hand, with our diplomatic relations and duties to foreign nations and their subjects; and, on the other hand, with the great interests of navigation and commerce, foreign and domestic. There is, then, a peculiar wisdom in giving to the National Government a jurisdiction of this sort, which cannot be wielded except for the general good, and which multiplies the securities for the public peace abroad, and gives to commerce and navigation the most encouraging support at home:" 3 Story Com. 533.

That these cases, intended to be provided for by the act under consideration, are *maritime contracts*, and therefore "civil causes of admiralty and maritime jurisdiction," there can be no doubt: *De Lovio v. Boit*, 2 Gall. R. 474; Dunlap's Admiralty Pr. 43.

They are therefore within the exclusive jurisdiction of the District Courts of the United States.

This question has been repeatedly decided by the Supreme Court of the United States. Statutes, similar in every respect to that of New Jersey, have been enacted in most of the states; and whenever they have come under the consideration of the Supreme Court they have been held to be unconstitutional and void, so far at least as they authorize proceedings *in rem*. Thus, in the case of *The Moses Taylor*, 4 Wallace 411, it was held that a statute of California, which authorizes actions *in rem* against vessels for causes of action cognisable in admiralty, to that extent attempts to invest her courts with admiralty jurisdiction, and is therefore unconstitutional. "The action against the steamer by name," say the court, "authorized by the statute of California, is a proceeding in the nature and with the incidents of a suit in admiralty. The distinguishing and characteristic feature of such suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title made under its decrees validity against all the world." And in the case of *The Hine v. Trevor*, 4 Wallace 555, where a similar statute of Iowa was under consideration, the court held that state statutes, which attempt to confer upon state courts a remedy for marine torts and marine contracts by proceedings strictly *in rem*, are void. In this case it was contended that the statute of Iowa might fairly be construed as coming within the clause of the 9th section of the Judiciary Act, which "saves to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." But the court say the remedy prescribed by the statute is in no sense a common-law remedy. It is a remedy partaking of all the essential features of an admiralty proceeding *in rem*. The statute provides that the vessel may be sued and made defendant without any proceeding against the owners, or even mentioning their names. And while the proceeding differs thus from a common-law remedy, it is also essentially different from what are called suits by attachment. In these cases there is a suit against a personal defendant by name, but because of inability to serve process on him, on account of non-residence or some other reason, the suit is commenced by a writ, directing the proper officer to

attach sufficient property of the defendant to answer any judgment which may be rendered against him.

But, besides these decisions of the Supreme Court of the United States, we have a recent decision of the Court of Appeals of New York, in a case involving the constitutionality of a statute of that state, precisely similar to our own, from which in fact our statute was copied. It is the case of *Bird et al. v. The Steamboat Josephine*. It has not yet been officially reported, but it was published in the New York Transcript of November 5th 1868. The court decided that the proceeding authorized by their statute against a vessel by name was a proceeding in the nature, and with all the incidents, of a suit in admiralty; that such a proceeding could not be sustained; and that the statute itself was unconstitutional.

It is pleasant to find this concert and harmony of opinion between the Court of Appeals of the state of New York and the Supreme Court of the United States, upon a question of conflicting jurisdiction between state and Federal courts.

But it is insisted, that although the statute of New Jersey may be unconstitutional, so far as it authorizes proceedings *in rem* against a ship or vessel for a breach of maritime contract, yet it nevertheless creates a lien upon such vessel, which a Court of Admiralty will recognise and enforce. There was a time when such an argument might have been successfully urged. The effect of such statutes undoubtedly is, to assimilate our law to that of continental Europe, or, in the language of Chief Justice WATKINS, in *Merrick v. Avery*, 14 Ark. 378, "to extend the privilege of the maritime lien upon sea-going vessels for their building or equipment in domestic ports, just as that lien existed in Europe, and would have prevailed in England, and so descended to this country, but for the jealousy of the common law." And it is undoubtedly true, that, for many years, the Supreme Court of the United States, by repeated decisions, held, that these liens thus created by local law might be enforced by proceedings *in rem* in the District Court; and that in 1844 they adopted a rule, expressly authorizing the process *in rem* where the party was entitled to a lien under the local or state law. But it is equally true that this rule has since been abrogated, and that such liens can no longer be enforced by proceedings *in rem* in the District Court.

Chief Justice TANEY, in delivering the opinion of the Supreme Court in the case of *The Steamer St. Lawrence*, 1 Black 522, gave a brief but lucid history of the legislation of Congress upon this subject, of the course of decisions by the Supreme Court, and of the reasons which led to the adoption of the 12th rule, in the first instance, and its subsequent repeal.

After the passage of the Judiciary Act of 1789, Congress passed the act prescribing the process to be used in the different courts it had established; and by that act directed that, in the courts of admiralty and maritime jurisdiction, the forms and modes of proceedings should be according to the course of the civil law. This act left no discretionary power in the Admiralty Courts, or in the Supreme Court, in relation to the modes and forms of proceeding. But this difficulty was soon seen and removed, and by the Act of May 8th 1792, these forms and modes of proceeding are to be according to the principles, rules, and usages which belong to courts of admiralty, as contradistinguished from courts of common law; and are made subject to such alterations and additions as the respective courts might deem expedient, "or to such regulations as the Supreme Court of the United States shall think proper from time to time by rule to prescribe to any Circuit or District Court concerning the same." And the power here conferred upon the Supreme Court was afterwards enlarged by the Act of August 23d 1842. It was under the authority of these two acts that the 12th rule, to which we have referred, was made in 1844, and afterwards altered by the rule adopted in December 1858. In the mean time, by a series of decisions in the Supreme Court, it had been held, that where liens had been given by the local law, the party was entitled to proceed *in rem* in the Admiralty Court to enforce it: *The General Smith*, 4 Wheat. 438; *Peyrouse v. Howard*, 7 Pet. 324; *The New Orleans v. Phœbus*, 11 Id. 175. When the rules, then, were framed in 1844, in conformity to the practice thus adopted, it was provided by the 12th rule, that, "In all suits by material-men for supplies or repairs or other necessities for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master, or the owner alone, *in personam*; and the like proceedings *in rem* shall apply to cases of domestic ships, where, *by the local law*, a lien is given to material-men for supplies, repairs, or other necessities." Now, there

would have been no embarrassing difficulties in thus using the ordinary process, *in rem*, of the civil law, if the state law had given the lien in general terms, without specific conditions or limitations inconsistent with the rules and principles which governed implied maritime liens. On the contrary, such process would have promoted the convenience and facilities of trade and navigation by the promptness of its proceedings, and would have disposed at once of the whole controversy, without subjecting the party to the costs and delay of a proceeding in the chancery or common-law courts of the state to obtain the benefit of his lien.

In many of the states, however, it was soon discovered that these laws, by which liens were thus created, did not harmonize with the principles and rules of the maritime code. Certain conditions and limitations were annexed to them; and these conditions and limitations differed in different states; and it became manifest that if the process *in rem* was to be used wherever the local law gave the lien, it would subject the Admiralty Court to the necessity of examining and expounding the varying laws of every state, and of carrying them into execution, and that, too, in controversies where the existence of the lien was denied, and the right depended altogether on a disputed construction of a state statute, or, indeed, in some cases of conflicting claims, under statutes of different states, when the vessel had formerly belonged to the port of another state, and had become subject to a lien by the state law. Such duties and powers are appropriate to the courts of the state which created the lien, but are entirely alien to the purposes for which the admiralty power was created, and

- form no part of the code of laws which it was designed to administer.

The proceeding, therefore, *in rem*, upon the ground that the local law gave the lien where none was given by the maritime code, was found upon experience to be inapplicable to our own mixed form of government. It was found to be inconvenient in most cases and absolutely impracticable in others; and the rule which sanctioned it was therefore repealed. The repealing rule provides that, "In all suits by material-men for supplies or repairs or other necessities for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*. And the

like proceedings *in personam*, but not *in rem*, shall apply to cases of domestic ships for supplies, repairs, or other necessities."

The consequence is, that in cases of domestic ships, for supplies furnished at a home port, a lien created by a state law is one which a court of admiralty can neither recognise nor enforce.

Hence it follows, that in this case, The Hoboken Coal Company have no standing in court, have no right to intervene, either for their own interest or to contest the claims of the libellants, and that the testimony taken on their behalf must be stricken out. Let judgment be entered in favor of the libellants, with costs as against the intervenors.

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*Supreme Court of Tennessee.*

R. A. GRAHAM v. MERRILL ET AL.

When the United States forces, during the late war, acquired firm occupation of part of an insurrectionary state, the citizens of that part so occupied were restored to their relations as citizens of the United States, and contracts between them and other citizens became valid.

The Act of July 13th 1861, and the Proclamation of the President of August 16th 1861, authorized, 1. Unrestricted commercial intercourse between the citizens of loyal states and of those parts of insurgent states in occupation of the Federal forces; and 2. Intercourse between citizens of the loyal and insurgent states, subject to the license of the President and the regulations prescribed by the Secretary of the Treasury; and the President's order of February 28th 1862 was a general license to such intercourse. But by the President's Proclamation of March 31st 1863, the distinction was abolished, and all intercourse between the citizens of loyal and insurgent states was made subject to license by the President and the regulations of the Secretary of the Treasury.

It was not necessary to the lawfulness of such intercourse that the party engaging in it should have a special license to himself by name under the President's own sign manual. The President's power to license might be delegated or might be exercised by a general proclamation, such as those of February 28th 1862 and March 31st 1863.

APPEAL from decree of the Chancellor overruling demurrer to complaint.

On May 24th 1864, Graham, a citizen of New York, on the one side, and Merrill and Cliffe, citizens of Williamson county, Tennessee, on the other, entered into articles of partnership to

engage in the business of buying and selling cotton. The place where the partners contemplated and agreed to buy cotton, was in that portion of the state of Tennessee within the military lines of and held in firm occupation by the national army. Cotton so bought, the articles stipulated, should be sent to and sold in the city of New York. At the time of making the contract, Graham had a license or permit from "the proper officer of the Government of the United States" to engage in the contemplated trade, and so informed Merrill and Cliffe. It was contemplated and agreed that the trade should be carried on "in strict conformity with the laws and regulations of the United States, regulating commercial intercourse" between the loyal and insurrectionary states. Graham furnished Merrill and Cliffe with large sums of money, and they bought and shipped to him much cotton, the proceeds of sales of which fell largely short of the money furnished.

The articles stipulated that each party was to have one-half the net profits, and to bear one-half the losses.

This was a bill for an account and contribution.

H. G. SMITH, J.—At the time of the making of the contract, the enemy relation did not subsist between the parties; and, therefore, they had the capacity to contract together, and their contract is not void by reason of enemy relation.

The national army had firm occupation of the country of the residence of Merrill and Cliffe. Such occupation established the dominion and government of the United States over that country, and restored the inhabitants to the relation of citizens of the United States. The previous enemy relation between the parties to the contract was thus ended, and their incapacity to contract with each other, by reason of their previous enemy relation, was also ended: *The Venice*, 2 Wall. 277; *The Ouachita Cotton*, 6 Id. 531.

It is another question, whether the subject-matter of the contract was lawful; a contract for commercial intercourse between a loyal state and a part of an insurrectionary state. If such trade was unlawful the contract was illegal and void. Generally, commercial intercourse between the loyal and disloyal states during the war of the Rebellion was unlawful. It was so made by the Act of Congress of July 13th 1861 (12 St. at Large 251),

and by the several proclamations of the President in conformity with the act, and also probably by the laws of war. But though generally prohibited as to all the insurrectionary states, exceptions were authorized by the Act of Congress and the proclamations of the President. Under the proclamations of August 16th 1861 (12 Statutes at Large 1262), unrestricted trade was authorized between the loyal states and such parts of the insurrectionary states as "from time to time should be occupied and controlled by the national forces engaged in the dispersion of the insurgents." Trade, also, was authorized between the loyal states and the disloyal states, by virtue of license granted by the President, and through and under regulations and restrictions prescribed by the Secretary of the Treasury and approved by the President. Such license was granted by the President, by order of date February 28th 1862, which recites: "Considering that the existing circumstances of the country allow a partial restoration of commercial intercourse between the inhabitants of those parts of the United States heretofore declared to be in insurrection, and the citizens of the loyal states of the Union, and exercising the authority and discretion confided to me by the Act of Congress approved July 13th 1861, entitled 'An Act to provide for the collection of duties on imports and for other purposes,' I do hereby license and permit such commercial intercourse, in all cases within the rules and regulations which have been or may be prescribed by the Secretary of the Treasury for the conducting and carrying on of the same, on the inland waters and ways of the United States."

Intercourse thus authorized and regulated, continued until March 31st 1863. On that day the President issued a further proclamation in regard to commercial intercourse between the loyal and disloyal states. The change made by that proclamation was to prohibit the unrestricted trade between the loyal states and the parts of disloyal states held and occupied by the national forces, which was authorized by the original proclamation. Such parts of the disloyal states were placed on the same footing as to trade as the residue and unoccupied parts of the disloyal states. The whole insurrectionary country was placed in the same condition, as to commercial intercourse with the loyal states. All were prohibited, except under license granted by the President "through the Secretary of the Treasury," and regula-



tions prescribed by the Secretary of the Treasury and approved by the President. But trade, in conformity with such license and regulations, was lawful in whatsoever part of the insurrectionary country it was carried on: *The Venice*, 2 Wall. 278.

The contract between the parties here was made after the proclamation of the President of March 31st 1863, and is therefore dependent, as to the validity of the trade agreed on, upon the condition of the law as it then was, by virtue of the Act of Congress and the proclamation last mentioned. The fact that the trade contemplated was between a loyal state and part of an insurrectionary state in the firm occupation of the national forces, does not seem to be of vital, if even of, material consequence. The military occupation of the country, wherein the cotton was to be bought, does not appear to give the trade any lawful quality, other than it would have in a region of country not so occupied. It is thus apparent that there was a trade which might be lawfully carried on between inhabitants of the insurrectionary country and residents of the loyal states. Such trade the parties in this case agreed to engage in. It follows that their contract to engage in such trade was lawful.

It was not necessary to the legality of the trade that the party engaging in it should have a special license to himself by name, from the President himself, under his sign manual. A fair construction of the Act of Congress of July 13th 1861, does not exact that the trade which the President, under the regulations of the Secretary of the Treasury, was authorized to license, should be carried on by special and individual licenses, under his sign manual. And such was not the practice at the time. Nor was it the construction put upon the act at the time by the President and Secretary of the Treasury, who were charged by the act with the duty and authority to allow trade, that the license must be issued by the President, directly to the individual licensed, or by authority of the President granted by himself in each particular case, upon his discretion exercised in each particular case, as to the individual to whom the grant of license was to be made. The act authorizes the President in his discretion to license and allow the trade. Nothing in it exacts, as of necessity, that the discretion was not in any manner or to any extent delegable. On the contrary, the fact that the trade licensed was to be conducted in pursuance of regulations made by the Secretary of the Treas-

sury, indicates that it was not intended to restrict the trade to individual instances designated in each particular case by the President himself, but to allow a trade in some measure of more general character, in conformity with general regulations prescribed for its government. That was the construction put upon the act by the President and Secretary. And in conformity with such construction, persons embarked in the trade, and, indeed, whole communities, when brought within the dominion of the sovereign government by the military forces. A construction so made at the time, and by the chief functionaries charged with the execution of the Act of Congress, ought not now to be departed from, unless for very cogent reasons. Such reasons are not apparent to this court.

The President repeatedly exercised his discretion and granted license to trade. This was done by the order of February 28th 1862, already recited. It was further done by his order of March 31st 1863, accompanying and approving the regulations of that date, issued by the Secretary of the Treasury. The order or license recites "that it appears that a partial restoration of intercourse between the inhabitants of sundry places and sections heretofore declared in insurrection, and the citizens of the rest of the United States, will favorably affect the public interest; therefore the President, exercising the discretion and authority confided to him by the Act of July 13th 1861, hereby doth license and permit such commercial intercourse between the citizens of the loyal states and the inhabitants of the insurrectionary states, in the cases and under the restrictions described and expressed by the regulations of the Secretary of the Treasury, of even date with the order," to wit, March 31st 1863.

A license to trade with the enemy in time of war is said to be *stricti juris*. By this is meant, in its ordinary application, that the license granted to the person is to be construed strictly, as to the extent of the power granted to him by it; in respect to the manner in which he may exercise it; the objects in which he may trade; the person with whom he may deal; the times and circumstances in which he may exercise the power; the good faith on his part in his use of it; the inability to transfer it to others or enable others to trade under it, and many other circumstances touching the construction and exercise of the authority granted by the license. But we are not aware of any principle or autho-

city which applies the like doctrine to the power of the sovereign or commander-in-chief of the army and navy, or to other public functionary, authorized by the public law or statutory law, to issue or grant license to trade with the enemy in time of war. In respect to the authority granted to the public functionary to authorize such trade, the ordinary principles of construction are properly applicable. And when the authorized officer of the government has exercised the power, and the citizens of the government have largely acted under the authority, confiding in the validity of its exercise, no good reason is obvious, but on the contrary, much reason is manifest why the citizens so confiding shall not have illegality imputed to their transactions under it.

It is not to be doubted that trade authorized and conducted under the license of the President, so granted, and in conformity with the regulations of the Secretary of the Treasury, is not to be deemed illegal.

Decree affirmed.

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*Supreme Court of North Carolina.*

KANE AND WIFE v. MCCARTHY AND WIFE ET AL.

Any woman, being a free white person, and an alien friend, married after the approval of the Act of February 10th 1855, to a man who was, at the time of such marriage, a naturalized citizen of the United States, becomes, by such marriage, *ipso facto*, herself a citizen of the United States, and capable of inheriting real estate, although she resided in a foreign country at the time of her said marriage, and has continued her actual residence there ever since.

And any alien woman answering the above description, and married before the approval of the said act, to an alien husband, who has been subsequently naturalized, becomes by his naturalization, *ipso facto*, herself a citizen of the United States, and capable of inheriting real estate.

It is the status of being married to—being the wife of—a citizen, which makes the alien woman a citizen of the United States.

THIS was an action for the partition of certain real estate in the city of Raleigh.

The facts of the case were as follows: John Kane, who was a native of Ireland, but a naturalized citizen of the United States, resident in the city of Raleigh, being seised of certain real estate in said city, died intestate May 20th 1868. The decedent left no lineal descendants. At the date of his decease all his collateral

relations were aliens, who could not inherit according to the law of North Carolina, except the *femes covert*s and infants, parties to the suit, who all claimed to be citizens of the United States, and therefore capable of inheriting.

The plaintiff Martha Kane was a sister of John Kane, a free white woman, and a native of Ireland, where she had always resided until after the said John Kane's death, and she was never in the United States, until she came here in 1867 to institute this action; but on the 28th day of November 1857, being of full age, she married the plaintiff Thomas Kane, her cousin, who was, at the date of said marriage, a naturalized citizen of the United States, and had resided therein from 1848 to 1857, when he returned to Ireland, after having been lawfully naturalized in the state of New York in October 1855.

Both the plaintiffs, after their marriage, remained in Ireland until after John Kane's death, having, however, always the intention of eventually removing to the United States; and in 1867, the plaintiff Martha came to this country to institute this action, leaving her husband still in Ireland.

The defendant Mary McCarthy was also a sister of John Kane, a free white woman and a native of Ireland: she immigrated into the United States during her infancy, in the year 1850, and continued to reside therein ever after. In May 1851 she intermarried with the defendant Dennis McCarthy, an Irishman, who landed in the United States on the 12th of March 1850, and has resided here ever since, having been lawfully naturalized in the state of New Jersey in October 1856.

The infant defendants, Thomas Patrick McCarthy and Isabella McCarthy, were the children of Dennis and Mary McCarthy, were both born in the state of New Jersey, and have resided there ever since their birth; and, since 1865, these infants had been in the pernanacy of the rents of, the real estate described in the pleadings.

The plaintiffs filed their complaint in the Superior Court of Wake county, setting forth the above facts, claiming one-half of the real estate, in right of the plaintiff Martha, as one of the heirs of John Kane, admitting that the infant defendants were entitled to the other half, as the other heirs of the said John Kane, alleging further, that the said infant defendants claimed the whole of said real estate, and that the defendants Dennis and

Mary McCarthy, in right of said Mary, also set up an *unfounded* claim to the whole of the said real estate, and demanded judgment of partition and an account of the rents and profits.

The defendants demurred, "because it appears upon the face of the complaint, that the facts therein stated are not sufficient to constitute a cause of action, and to entitle the plaintiffs to the judgment which they demand."

The court gave judgment on the demurrer for the defendants, and thereupon the plaintiffs appealed to the Supreme Court.

*Ed. Graham Haywood*, for plaintiffs.—1st. By virtue of the 2d section of the Act of Congress of the 10th of February 1855, Martha Kane was, at the time of descent cast, a citizen of the United States, and capable of inheriting to her brother John.

It is admitted that Martha Kane is a woman who has married a naturalized citizen of the United States since the act, the only question is, was she, at the date of her marriage, "*a woman who might lawfully be naturalized under the existing laws.*" The auxiliary verb "*may*," in all its forms, has a *potential* meaning; it is used to express, not what *is*, but what *is possible*; and this expression, according to its natural interpretation, is equivalent to, any woman for whom, by the laws extant in 1855, naturalization was or is possible; in other words, any woman who, by the laws in force in 1855, was or is capable of becoming a citizen of the United States through the process of naturalization as then regulated by law.

2d. To ascertain who might lawfully be naturalized under the existing laws, we refer to the Naturalization Act of 1802, and find that "any alien being a free white person, provided that he or she is not an alien enemy," is capable of becoming a citizen of the United States by the process of naturalization: 10 *Stats. at Large*, ch. 71, p. 604; 1 *Bright. Dig. of Laws*, tit. *Citizenship*, p. 132, and tit. *Alien*, p. 73; 2 *Kent's Com.* (ed. of 1867, by G. F. Comstock), p. 15 n., and p. 36; 1 *Scrib. on Dower*, from p. 174 to p. 176, and pp. 144 and 147; 2 *Am. Law Reg.* (O. S.) p. 198; *Barton v. Burton*, 3 *Am. Law Reg.* (N. S.) p. 425; 26 *How. Prac. Rep.* p. 474; *Greer v. Sankston*, 26 *How. Prac. Rep.* p. 471; *Ludlam v. Ludlam*, 31 *Barb.* (N. Y.) p. 486; affirmed in the Court of Appeals, 26 *N. Y. Rep.*; also 3 *Am. Law Reg.* (N. S.) pp. 595 and 599.

3d. The Act of 1855 was not intended to provide a new process of naturalization for alien women and children, as is apparent from its title and whole purview and meaning; it was enacted to define and regulate the legal status as to citizenship of foreign-born wives and children of United States citizens, and to identify them in citizenship with the father and husband, without any process of naturalization. Its main object was to dispense with the process of naturalization in cases coming within its operation.

4th. To allow the words "who might lawfully be naturalized under the existing laws," the effect of compelling an alien woman to use the whole process of naturalization, except the final step of admission by a competent court of record, before she becomes a citizen by reason of the fact that she is the wife of a citizen of the United States, is to permit this single sentence to defeat the whole policy, purpose, and scope of the act.

*W. H. Battle*, for infant defendants.—By the laws of the United States, the following are indispensable requisites to naturalization. 1st. Five years' residence; 2d. Proof of good character; 3d. Renouncing title of nobility; 4th. Not being an alien enemy. Martha Kane was a native of Ireland and had always resided there; what was her character does not appear, the only requisite she had was that of being a white woman. Is that alone sufficient?

Residence here was a *sine qua non* to being naturalized. Act of 1802 required five years' residence, proof of good moral character, and attachment to the Constitution. Act of March 1813 required five years' residence. Act of March 1816 required the same. Act of May 1824 required five years' residence even for minors. Act of 1828 required five years' continued residence and particular proof of it. Act of 1848 only strikes out the clause, "without being at any time within the said five years out of the territory of the United States," which was in the Act of 1813, still leaving a five years' residence to be necessary. It will thus be seen that all the acts insist upon residence as an indispensable requisite to naturalization, without repeating the clause which requires proof of character.

An alien *feme covert* may be naturalized: see *Ex parte Pic*, 1 Cranch, Cir. Co. Rep. 372; and she must be naturalized before she can claim dower: see 1 Cruise Dig., tit. *Dower*, chap.

1, sect. 29 and 30; Smith on Real and Per. Property, p. 296; *Paul v. Ward*, 4 Dev. 247.

Compare our act with the 7 & 8 Vict. ch. 66, sect. 16, and it will be seen that ours is a copy of it, with the additional words, "who might lawfully be naturalized under the existing laws." The British statute reads thus: "Any woman, married, or who shall be married to a natural born subject, or person naturalized, shall be deemed and taken to be herself naturalized, and have all the rights and privileges of a natural born subject:" see *Regina v. Manning*, 66 Eng. Com. Law Rep. p. 886.

*S. F. Phillips* and *R. H. Battle, Jr.*, for the adult defendants.—In 1863, at the death of John Kane, Mary McCarthy his sister, being a person who, under existing laws, *might be naturalized*, and being the wife of a citizen of the United States, was herself a citizen, and so is an heir of John Kane.

If she be an heir, she is so to the exclusion of her children, the defendants Francis P. and Isabella McCarthy.

In 1863, at John Kane's death, his sister Martha Kane, though the wife of a citizen of the United States, was not a woman who *might be naturalized*, and could not be John Kane's heir.

The words "*who might be naturalized*" mean one *who is in a condition to be naturalized* under existing laws, and the intent of the act must have been to dispense with the usual forms attending the process of naturalization in case of marriage to a citizen. In such case, omission by the wife to go through the *forms* of naturalization (and *naturalization* of a woman by the courts is of rare occurrence) is cured by her being married to a citizen. That the woman should be a resident, and subject to the jurisdiction of the courts of the United States, must be required.

As to the question of *residence*, the policy of the legislation of the United States, is apparent by reference to the words of Mr. Webster's bill of 1848, in which the words "and shall *continue to reside* therein," show that residence in the country was presumed as a necessity of citizenship.

*Who might be naturalized*, cannot be a periphrasis for *free white woman*. Reference is made in the 1st section of the act to the Act of 1802, in which the expression *free white person* is used six times.

The Act of 1802 was before the draftsman, and there was no

reason for the abandonment of an expression of certain meaning for one intended to be synonymous but of doubtful import. *Who might be* was used deliberately, and does not mean *who may be*.

*Burton v. Burton* is an authority against the plaintiff, though the reasons given for the decision were not well considered, and the *dicta* are bad as well as gratuitous.

As to the effect of change of words in statutes, see Dwarris on Statutes, p. 707.

The opinion of the court was delivered by

PEARSON, C. J.—The right of the feme plaintiff, Martha Kane, to take by descent, as one of the heirs at law of John Kane, depends upon the construction of the 2d section of the Act of February 10th 1855.

The wording of this section is very precise, and, as it seems to us, its meaning is too clear to leave much room for construction, or to call for much discussion.

What description of woman might lawfully be naturalized, under the existing laws? That depends on the Act of 1802: "Any alien, being a free white person, may be admitted to become a citizen of the United States on the following conditions, and not otherwise:" sec. 1. And there is a proviso that the person must not be an alien enemy. Martha Kane is a free white woman, a native of Ireland, and was not an alien enemy, therefore she might lawfully have been naturalized under the existing laws, and answers the description required by the section under consideration; she was married to a citizen of the United States when the descent was cast, and was then herself a citizen, by force of the Act of 1855, and takes as one of the heirs of her brother.

But it is said that Martha Kane had no residence in the United States before or at the time of the descent cast. That is true; and it might be added that she never filed a declaration of intention, never took an oath to support the Constitution of the United States, or renounced her allegiance to the Queen of Great Britain; and there was no proof of her being a woman of good moral character, attached to the principles of the Constitution of the United States.

The reply is,—these are conditions which persons applying for naturalization *under the Act of 1802*, are required to comply with.



But there are no such conditions imposed by the Act of 1855; it only requires that the woman shall be one of such a description as might be lawfully naturalized under the existing laws, and if she answers the description, the very object of the act was to dispense with all these requirements, and make her a citizen by the mere fact of her being married to a citizen of the United States. In other words, the wife of every citizen of the United States "is to be deemed and taken to be a citizen," so that if a citizen marries an alien woman residing here, *ipso facto* she is a citizen also, without going through the forms required by the Act of 1802; or, if he marries an alien woman residing in Ireland, *ipso facto* she is a citizen, and should he die without returning to the United States, she will take dower; or, if he settles his land on her by will or otherwise, she will take and hold. The policy of the Act of 1855 is to identify the wife with the husband in regard to citizenship, and thus to carry out the principles of the common law as to the relation of "husband and wife."

Does the conclusion need confirmation? It is furnished by the 1st section; the *status* of the father is made that of the child, and on its birth, *ipso facto*, it is a citizen of the United States, without residence, declaration of intention, or oath to support the Constitution, all being dispensed with, and the only limitation is, that if the child never comes to reside in the United States, the right of citizenship shall not descend to his children.

And this section puts a limitation upon the descent of citizenship to the children of a wife who never comes to reside in the United States; so if her citizen husband dies, and she marries an alien, her child by the second husband would not be a citizen, for it is confined to children whose *fathers* are citizens.

On the argument, our attention was called to 7 & 8 Vict.: "Any woman, married or who shall be married to a natural born subject or person naturalized, shall be deemed and taken to be herself naturalized, and have all the rights and privileges of a natural-born subject." It is clear that the Act of 1855 was taken from this statute, and it is then asked, why change the wording, and, instead of "any woman," use the paraphrase "any woman who might lawfully be naturalized under the existing laws," if the operation of the act was to be as broad and sweeping as that of Victoria?

It is not seen how this can have much effect upon the argu-

ment, but the solution is easy. The Act of 1802 does not make *any woman* capable of being naturalized, so it was necessary to make some change by adding the words "free *white* woman," or some equivalent expression, and the history of parties in 1855 fully explains why this equivalent expression was adopted, instead of "free *white* woman;" for at that time an angry contest was going on in reference to the words "all men are born free and equal," and a formidable party took the ground that the Act of 1802 was in violation of the Declaration of Independence, in so far as it attempted to exclude from citizenship all who were not "free *white* persons." If the words "free white" had been left out, the bill would have met with opposition from the South, and if these words had been expressed, it would have met with opposition from the North, so the reason for adopting an expression which leaves that question open is obvious.

Having settled the right of Martha, the right of her sister Mary can be settled in few words.

Mary was a resident of the United States at the time of her marriage; in this, seemingly, she has the advantage of Martha; but her husband was not a citizen of the United States at the time of her marriage; in this, seemingly, Martha has the advantage of her, but in fact they both stand on the same footing, for it is not the ceremony of marriage, or its time or place, but it is the fact of being "married to," that is, being the wife of a citizen, that makes the woman a citizen. The circumstance that her husband was not a citizen at the time of the marriage is wholly immaterial, for he became a citizen afterwards; *ipso facto* she being a free white woman married to a citizen, comes within the description and the very words of the Act of Congress, and is deemed and taken to be a citizen; for it is the *status* of being married to—being the wife of a citizen, that makes her one.

It can in no possible view make any difference whether the marriage ceremony is performed first and then the husband becomes a citizen, or whether he becomes a citizen first, and the marriage afterwards takes place. Wherever the two events concur and come together, she is a woman married to a citizen.

The thing seems to us too plain to admit of discussion—it is like trying to prove that two added to two make four.

Mary is entitled to the other moiety, and the defendants, her two children, are excluded.

There is error, judgment reversed and judgment that plaintiff recover one undivided moiety of the lands mentioned in the pleadings, and that partition be made between the plaintiff Martha and the defendant Mary.

To this end, it is referred to the clerk to inquire whether a sale will be necessary for the purpose of partition; and an account will be taken of the rents and profits; the plaintiff will have judgment for costs.

*Burton v. Burton*, 26 Howard's Practice Rep. 474; *Ludlam v. Ludlam*, 81 Barb. 487, cited on the argument, received due consideration by the court.

Since the foregoing case was decided the Supreme Court of the United States, in *Kelly v. Owen*, have construed the same Act of Congress. We have not seen the full opinion (which will be published in 7 Wallace); but, judging

from the syllabus, furnished us by the Reporter (ante, p. 444), the court seems to take the same view of the act as the court in the foregoing case.

J. T. M.

### *Supreme Court of Alabama.*

#### J. DUBOSE BIBB v. EVELYN POPE.

The husband and wife cannot enter into a mortgage of her statutory separate estate for the purpose of subjecting it to sale for the payment of the husband's debts; and if they do, a court of chancery will not permit the mortgage to be enforced by sale of the wife's separate estate, if she objects to it.

THE opinion of the court was delivered by

PETERS, J.—On the 5th of April 1866, Augustus Pope, the husband of Mrs. Evelyn Pope, appellee, borrowed of J. Dubose Bibb, appellant, the sum of \$10,000, for which he gave his bill of exchange for \$12,400, payable eight months after date, to order of said Bibb. On the same day said Augustus Pope executed and delivered to said Bibb a certain conveyance in writing, in the form of a mortgage, whereby he conveyed to Bibb certain lands therein named, which belonged to himself, and a lot numbered 57 in the city of Montgomery in this state, which was the separate property of his wife, said Evelyn Pope. This mortgage contained a power to sell the land contained therein, in the event that Pope failed to pay said bill of exchange at its maturity. Mrs. Pope united with her husband in this mortgage, and the same is attested by two

witnesses. At the maturity of the bill of exchange Pope failed to pay it, and Bibb then proceeded to advertise a sale of the mortgaged property, for the purpose of selling the same for payment of his debt against said Augustus Pope; and included in said advertisement the lot belonging to Mrs. Pope, as her separate estate. Thereupon Mrs. Pope by her next friend filed her bill in the Chancery Court of Montgomery county aforesaid against said Bibb, and said Augustus Pope her husband, for the purpose of enjoining and preventing said proposed sale of her said lot No. 57. An injunction was granted her, and upon the final hearing it was made perpetual. The bill was filed on the 23d day of January 1867. It appears from the bill and proofs, that B. N. Wilkerson and his wife Elizabeth gave the lot in controversy to Mrs. Pope by deed, on the 10th day of August 1860, to have and to hold the same to her, "her heirs and assigns, to her use and behoof for ever." Upon the hearing, the Chancellor sustained the bill and perpetually enjoined Bibb from selling said lot No. 57 as the separate estate of Mrs. Pope, under said mortgage, and taxed Bibb with the costs. From this decree Bibb appeals to this court.

The only question discussed at the bar was, whether Mrs. Pope was bound by said mortgage, and whether her statutory separate estate was liable to be sold under it, to pay her husband's debt due by said bill of exchange to said Bibb. This question has not heretofore been settled by any decision of this court. In discussing it, the court cannot close its eyes to the fact that the wife is under the *power* of the husband, and often acts, when he chooses to invoke her aid, under an influence but little less potent than actual duress, nor can it ignore the further fact that the law, under the common-law system, has treated the wife in some respects as the servant of the husband, subject to his control, even to chastisement by stripes "in case of any gross misbehavior:" 1 Bl. Com. 444, 445; 2 Kent Com. 181. She has been placed very much upon the footing of a child during its minority. She has had no voice in any one of the great departments of the government; no voice at the ballot-box; no voice on the jury. She rarely deals with the husband, nor, where he is interested, upon equal terms with him. These circumstances have rendered her, of late years, the peculiar object of legislative solicitude and protection. The law-making wisdom of the state has seen and felt

her need of greater protection than the common law afforded, and has devised, under various titles, "laws for the protection of the rights of married women." Thus far such laws have recommended themselves so strongly to public favor, that, to secure them from repeal and fluctuation, they have been in many instances incorporated into the fundamental law of the state. And we think it safe to say that the declared and manifest purpose of such enactments furnishes a just rule for their interpretation. They were made to avoid the known insecurity to which the estates of married women are exposed, from the improvidence or maladministration of the husband, who necessarily exercises so large a control over the wife, and through her over her estate.

The Code of 1853, which is copied into the Revised Code of this state, and which latter code, with certain modifications, is now the law that must govern the judgments of this tribunal, declares that "all the property of the wife, held by her previous to the marriage, or which she may become entitled to after the marriage in any manner, is the separate estate of the wife, and is not subject to the payment of the debts of the husband." And another section of the same law vests in the husband, as the trustee of the wife, her separate estate; and gives him the control and disposition of the "rents, income, and profits thereof, but such rents, income, and property are not subject to the payment of the debts of the husband." Rev. Code, §§ 2371, 2372; *Patterson v. Flanagan*, 37 Ala. 513.

The bill in this case is filed by the wife, Mrs. Pope, to prevent the sale of her separate estate for the payment of the debt of her husband, Augustus Pope—a thing which the statute declares shall not be done. If, then, this sale is permitted, the whole purpose of the law, so far as it protects the wife's separate estate, will be defeated, for when the principle is once admitted that this may be done, methods and ways will soon be discovered to carry it into unlimited effect. This cannot be allowed. It would be a violation of law by indirection; and what it is illegal to do directly, is also illegal if done indirectly. For it is the *thing* that is forbidden, and not the *manner* of doing it. In whatever form, then, whether of law or in equity, this is attempted, the power to do it is denied by the express words of the statute, by the whole scope of its intent, and by the character of the evil sought to be remedied.

It was very earnestly contended at the bar, by the learned counsel for the appellant, that the wife had the power to sell, and therefore she had the power to mortgage her estate for the payment of the husband's debts: because the power to sell was the greater power; and as the greater always contained the less, the right to mortgage, because it was a *form* of sale, followed the power to sell as necessary consequence: *Omne major continet in se minus*: Broom's Max. 129; 2 Kent: 558, 554; Hamilton's Log. 208. This is an admitted rule of logic and also of law, but it is not strictly applicable in this case. The distinction is lost sight of that the wife can neither sell nor mortgage her separate estate under the statute, for the payment of the husband's debts. This would defeat the purpose and words of the act of itself. It would tear away from the wife its whole protective force, whenever the husband chose to avail himself of her means. She is much under the influence of the affections, and shrewd and unscrupulous men know how to take advantage of this weakness, often to her beggary and ruin, and it is this that the law interposes to prevent. In *Warfield v. Ravesties and Wife*, this court have said that "property held by the wife, either under the Act of 1850 or under the Code, cannot be said to be the separate estate of the wife *in its broadest sense*:" 38 Ala. 528. Yet it is in this sense that the appellant presses his rights on the court. The sale that the wife and her husband are permitted to make without the aid of a court of chancery is only such a sale as is mentioned in the act. That is, a sale for the purpose of reinvesting the proceeds in other property, which is also the separate estate of the wife, or for the support of the family. A mortgage within these limits would be almost a futile act; and such is not the mortgage here insisted on: Rev. Code, §§ 2373, 2374, 2376; *Alexander v. Saulsbury*, 37 Ala. 375; *Warfield v. Ravesties and Wife*, 38 Id. 518.

It is further urged against the validity of this mortgage that it is a fraud upon Mrs. Pope, and void for that reason. Her husband is her trustee; the mortgage could not have been accomplished without his concurrence; that its execution prejudiced the trust estate for the benefit of the trustee and not for her benefit; and that if it is enforced, it will utterly ruin the trust estate solely for the trustee's individual profit. Bibb knew this, or was bound to know it, and cannot be excused if he did not. And to permit him to take advantage of it would be to aid him and the trustee

to profit by their own injurious acts: Broom's Max. 215, 216 And although the transaction might not be strictly and technically a fraud, it has the same effect. And upon the same principle that the greater contains the less, it may be said with equal truth that, things equal to the same thing are equal to each other. So that whatever has the effect of a fraud in the management of a trust must be treated as a fraud: Rev. Code, § 2372; *Johnson v. Thweatt*, 18 Ala. 741; *Boney v. Hollingsworth*, 28 Id. 690; *Trippe v. Trippe*, 29 Id. 687; *Charles v. Du Bose*, Id. 367; 1 Story's Eq., § 822; 1 Id. 323.

Decree affirmed.

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*Supreme Court of Michigan.*

JAMES FOSTER v. THE PEOPLE.

An accomplice who has given testimony criminating himself as well as his co-defendant, on whose trial he testifies, cannot refuse to answer fully on cross-examination concerning the entire transaction of which he has undertaken to give an account, and in which he had shown himself guilty.

Evidence that a person charged with larceny had previously attempted to purchase a chattel similar to that stolen, has no tendency to disprove theft, and is not admissible for that purpose.

THE opinion of the court was delivered by

CAMPBELL, J.—The respondent was informed against jointly with one William McCoy, in the Circuit Court for the county of Macomb, for the larceny of a horse and some other articles. Foster was tried separately, and the other defendant, McCoy, was used by the People as a witness against him.

McCoy proved facts tending to show the guilt of Foster, and showing also his own guilt in receiving the horse in Detroit and taking him to Toledo, where the witness was arrested with the stolen property. Upon cross-examination he admitted that he had made an affidavit for continuance, in which he swore that, as he had been advised by counsel, and believed, he had a good defence upon the merits. Counsel for Foster then asked what that defence was. The counsel for the People objected to the question, on the ground that a person accused of crime could not, while a trial was pending, be compelled to disclose his defence. The court overruled this objection, and then the witness declined

to answer. The record does not show on what ground the witness declined. The court refused to direct him to answer. Whether the witness had or had not such a privilege, it was not an objection which any one but the witness himself could raise upon the trial, and probably the court overruled it, when made by the prosecutor, on this ground, inasmuch as when made by the witness it was allowed. Privilege from crimination or the like is no ground for refusing to allow questions to be put, if not objected to by the party privileged: 1 Greenl. Ev. § 451; Roscoe Cr. Ev. p. 174; note to *Thomas v. Newton*, 1 Moody & Malk. 48; *Commonwealth v. Shaw*, 4 Cush. R. 594; *Southard v. Bedford*, 6 Conn. 254.

It cannot be reasonably claimed that the question was too irrelevant to be answered, even if such an objection could be taken by a witness. Any defence which he may have had against the charge could only have related to matters directly bearing upon what he had already testified to, because the charge was against both him and Foster, and anything throwing light upon any transaction connected with the history of the theft, from its inception to the arrest of the property in his hands, was receivable in evidence on the trial, and was properly received by the court. If excluded at all, it must be on some ground of privilege which justified the witness in refusing to disclose the facts referred to.

Nor can it be regarded as unimportant to enable the jury to appreciate the real character of the witness as a reliable narrator. It has always been understood that the testimony of accomplices against a prisoner should be scanned with jealousy; and in many cases it has been intimated that no conviction could properly be had upon that alone. We do not hold to this extreme doctrine, but leave the credit of such persons to the jury; yet the quality of such testimony can never be regarded as entirely separated from the character which is indicated by their crimes; and if the position they occupy indicates moral turpitude, there is a necessity for more thorough cross-examination, and nothing ought to be shut out which can sensibly aid in explaining their credibility, unless there is some fixed rule of law that excludes it.

The witness not having given any reason for refusing to answer, we can only infer what reasons he might have had; and the only ones that have been suggested from any quarter are, 1st. His



supposed right to keep to himself his communications with counsel relative to his defence; and, 2dly. His right to avoid criminating himself in any way.

It has been suggested that the crimination which might be created by an answer to the question would go beyond any liability upon the larceny and apply on a charge of perjury, which might lie if he swore to facts making him responsible, and had before made an affidavit contradicting those facts. If any necessary contradiction was created by the affidavit, it is difficult to see how he could be put in any worse condition by explaining to what it referred. But it is unnecessary to consider that point here, because no such contradiction appeared. The affidavit that he had a defence on the merits to this information agrees well enough with his testimony, because, while proving conclusively his guilt, he has, so far as his testimony is concerned, disproved any liability under this information, which charged an offence in Macomb county, while he swears to acts none of which were acknowledged to have been committed by him or by his procurement in that county. According to his showing, he could be held in Wayne and in Monroe, but not in Macomb.

The question therefore narrows itself to an inquiry whether, after undertaking voluntarily to explain the transactions connected with the larceny and disposition of the property involved in the charge on trial, and after answering fully the direct questioning of the prosecution, and unequivocally criminating himself to the extent of complete legal guilt of larceny of that property, he can then refuse to answer further and be protected against further disclosures relating to the same transactions.

No principle is better settled than that no inference can be permitted against a witness because he asserts his privilege: *Carne v. Litchfield*, 2 Mich. R. 340; *Rose v. Blakemore*, Ryan & Moody 382; Lord ELDON in *Lloyd v. Passingham*, 16 Ves. R. 64; *Knowles v. People*, 15 Mich. R. 409. This doctrine is necessary in order to make the privilege of any value. But the necessity of making the privilege effectual renders it equally necessary to take care that where such protection would lead to absurd or unreasonable consequence, it shall not be allowed.

It would certainly lead to most startling results if an accomplice, who had made out a clear showing of a prisoner's guilt, and has, in doing so, criminated himself to an equal degree, could

refuse to have his veracity or fairness, or bias or corruption tested by a cross-examination, and yet be allowed to stand before court and jury on the same footing with any other witness who has been perfectly candid, but who may have been convicted of a similar felony. It is perfectly evident that where a witness who has undertaken to give a full account of a transaction, and has not spared himself from conclusive accusation, then turns round and refuses to answer further, his motive must be something more than to save himself from the criminal exposure; and it is of great importance to learn why such a course is adopted. If in those cases where cross-examination is most desirable, to test the credit of a man who is seeking to save his own liberty by swearing away that of another, it can be completely prevented at the option of the witness himself; it would be difficult to justify the rule which allows co-defendant to be used by the prosecution at all, when they cannot be received for the defence. I cannot conceive that the law will tolerate such a state of things. When a man has voluntarily admitted his guilt, he has done all that he can to criminate himself; and his protection from further disclosure on the same subject is no protection whatever, because it cannot undo what makes the whole mischief.

The cases which apply to ordinary witnesses, who do not stand properly on the same footing with accomplices, do not in any way sanction such a stretch of privilege. It has been decided, and is the received doctrine, that a witness is entitled to decline answering not only questions which directly criminate him, but also any questions which may apply to facts forming links in the chain of criminating evidence. And where he has not actually admitted criminating facts, the witness may unquestionably stop short at any point, and determine that he will go no further in that direction. He may judge that his protection does not require him to avoid replying concerning some facts, when as to others the tendency is or seems to him more direct and incriminating. Yet even this doctrine, upon the particular facts of the case, although the witness refused to answer the only question which applied directly to the guilt involved, was held in so much doubt in *Regina v. Gurbett*, Dennison's Cr. Cas. 236, s. c. 2 Car. & Kir. 474, that the Court of Exchequer Chamber was unable to agree on the first argument, and on the second argument, after some changes in the

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Bench, the three Chiefs of the Courts, DENMAN, WILDE and POLLOCK, and PATTESON, COLERIDGE and ERLE, JJ., dissented from the other nine, and held the witness had gone too far to claim any further privilege. He had undoubtedly gone very far, but, nevertheless, he had not convicted himself, and the decision, while right in its principles, was also correct, as it would seem, upon the facts. As no opinions are reported, we cannot ascertain the precise views of the judges, who do not seem to have agreed as to how far the witness had claimed his privilege. But the rule which allows a witness to refuse answering questions not directly pointing to guilt, rests solely on the doctrine that, as in most cases the crimination would be made out by a series of circumstances, any one of them may have such a tendency to aid in reaching the result that an answer concerning it may supply means of conviction by aiding the other proofs which it indicates or supplements on behalf of the prosecution. The right to decline answering as to these minor facts is merely accessory to the right to decline answering to the entire criminating charge, and can be of no manner of use when that is once admitted, and must be regarded as waived when the objection to answering to the complete offence is waived. The law does not endeavor to preserve any vain privileges; and such a privilege as would allow a witness to answer a principal criminating question, and refuse to answer as to its incidents, would be worse than vain; for, while it could not help the witness, it must inevitably injure the party, who is thus deprived of the power of cross-examination to test the credibility of a person who may, by avoiding it, indulge his vindictiveness or corrupt passions with impunity. The distinction between the cases where a witness has or has not furnished sufficient evidence to criminate himself, is clearly recognised in *Amherst v. Hollis*, 9 N. H. 107, and in *Coburn v. Odell*, 10 Foster 540, as well as incidentally in numerous other cases, which hold that when he had once made a decisive disclosure his privilege ceased. And the further consideration is also recognised that a witness has no right, under pretence of a claim of privilege, to prejudice a party by a one-sided or garbled narrative.

As Mr. Phillips very neatly expresses it: "A witness may waive his privilege and answer at his peril. From the nature of the right it may be inferred that he will be at liberty to answer,

or to refuse to answer, any questions at his discretion; and that his consenting to answer some questions ought not to bar his right to demur to others. On the other hand, it is only reasonable that he should not be allowed, by any arbitrary use of his privilege, to make a partial statement of facts to the prejudice of either party:" 2 Phill. Ev. (Edw. ed.) 935.

Accordingly, where a witness has voluntarily answered as to material criminating facts, it is held with uniformity that he cannot then stop short and refuse further explanation, but must disclose fully what he had attempted to relate. This view is adopted by the text writers, and is very well explained in several of the authorities where the principle is laid down and enforced: 1 Starkie Ev. 206, 19th Am. ed.; Roscoe's Cr. Ev. 174; 1 Greenl. Ev. § 451; 2 Phill. Ev. 935; 2 Russ. Cr. 931; *Coburn v. Odell*, 10 Foster 540; *State v. K.*, 4 N. H. 562; *State v. Foster*, 3 Foster 348; *Foster v. Pierce*, 11 Cush. 437; *Brown v. Brown*, 5 Mass. 320; *Amherst v. Hollis*, 9 N. H. 107; *Low v. Mitchell*, 18 Me. 272; *Chamberlain v. Willson*, 12 Vt. 491; *People v. Lokman*, 2 Barb. 216; *Norfolk v. Gaylord*, 28 Conn. 309.

In *Foster v. Pierce*, 11 Cush. R. 437, it is held that where a witness knows in the beginning that his testimony in the case must expose him to a criminal charge, he must claim his privilege in the outset or waive it altogether. And as applied to cases in which that is the gist of the inquiry, this rule appears to be necessary and just to prevent partial and unfair statements. It is probably not designed to apply to any others.

When accomplices are allowed to testify for the purpose of furnishing evidence against a prisoner, they not only know that they are expected to criminate themselves, but they do it with the prospect of an advantage, which, if not absolutely promised, is substantially pledged to them if they make full disclosures. If they see fit to furnish criminating proof, there is every reason to compel them to submit to the fullest and most searching inquiry. They expressly waive their privilege by giving such proof, for they could not be sworn at all without their consent while under a joint indictment; and if not indicted they could still refuse to furnish evidence of joint misconduct. But there is neither reason nor show of authority which can in any case allow to them any privilege whatever when they have gone so far already as to any

matters in which they and the prisoner on trial have been connected. As to separate and purely private transactions, not connected with the matters under inquiry, they stand like any other witnesses, because they are not, as to those, accomplices at all, and no protection is pledged to them on such charges: 2 Russ. Cr. 927. Even on the principles applied to ordinary witnesses they would not be protected, as we have seen, after making any conclusive disclosure. They come upon the stand for no other purpose, and they have never been allowed, under such circumstances, to stop short of a full disclosure. And no privilege is recognised as then belonging to them: 2 Phill. Ev. (Edw. ed.) 930 note; 2 Russ. Cr. 927; *Commonwealth v. Price*, 10 Gray's R. 472; *State v. Coudry*, 5 Jones's L. R. 418; *Brown v. Brown*, 5 Mass. R. 320; 2 Phill. Ev. 936.

The witness in the present case ought not to have been permitted to decline answering the question put to him touching the character of his defence, as alluded to in his affidavit for continuance.

The other error assigned was, that the court ought not to have refused to allow respondent to prove that, within the previous six months, and before the time of the theft, he had applied to the witness Collyer to purchase a horse. This was to corroborate a defence set up that respondent purchased the horse alleged to have been stolen.

We cannot perceive how a desire or offer to purchase a horse tends to prove that a person did not subsequently steal one. Even the most inveterate thieves must sometimes purchase articles; and the fact that they do so, would not at all interfere with their misconduct as to others. The evidence was clearly inadmissible, and its rejection was proper.

But for the other error there should be a new trial.

The other justices concurred.

## ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF CALIFORNIA.<sup>1</sup>SUPREME COURT OF VERMONT.<sup>2</sup>

## ACT OF GOD.

*Acts of God.*—Those acts are to be regarded, in a legal sense, as the acts of God which do not happen through human agency, such as storms, lightnings, and tempests. If it appears that an injury to the demised premises has been sustained in any way through the intervention of man, it is not the act of God: *Polack v. Pioche*, 35 Cal.

The elements are the means through which God acts, and "damages by the elements" are damages by the act of God: *Id.*

## AMENDMENT.

*Of Writs.*—Amendments of writs are not allowed that change the parties to actions; but where a suit is brought only in the firm name of the plaintiffs who are partners, an amendment by inserting the individual names of the members of the firm, is allowable, whether it be by inserting the Christian name only, or a full name: *Lewis v. Locke. Homer v. Same*, 41 Vt.

Where the plaintiffs were not named in their writ except as Marshall A. Lewis & Co., it was *held*, that the court properly granted leave to amend by inserting the name of Edward Warner, who was one member of said firm, Marshall A. Lewis being the other: *Id.*

Also, where the plaintiffs were not named except as Homer, Bishop & Co., an amendment by inserting the name Samuel John M. before Homer, and the name John O. before Bishop, was *held* allowable: Gen. Sts., ch. 30, § 41: *Id.*

## ATTORNEYS.

*Power of Court to pass upon their Authority to act.*—An attorney's license is *prima facie* evidence of his authority to appear for any person whom he professes to represent; but if the supposed client denies his authority the court may require him to produce the evidence of his retainer under the supervisory power which it has over its own process and the acts of its officers. This the court may do either upon the direct application of the person or party represented, or upon motion of the attorney of the opposite party to dismiss, founded upon the affidavit of the person or party concerning whom the motion is made: *Clark v. Willett*, 35 Cal.

## BOUNDARY.

*Evidence—Declarations of Deceased Person.*—The declaration of a deceased person as to the location of a disputed boundary, otherwise admissible, are not rendered inadmissible by the fact that they were

<sup>1</sup> From J. E. Hale, Esq., Reporter; to appear in 35 Cal. Rep.

<sup>2</sup> From W. G. Veazey, Esq., Reporter; to appear in 41 Vt. Rep.

made off the land, and because the line referred to was not actually pointed out or shown: *Towers v. Silsby and Smith*, 41 Vt.

The question was, which of the two lines, 14 rods apart, was the true range line. One survey of 5th division lots was made in 1806, and one in 1808, and one of these lines was run in one, and one in the other of said years, and the one run in 1808 was conceded to be the true line. In 1830, G., then an old man, since deceased, an original proprietor and one of the committee appointed to procure the survey of 1808, and who made the report as recorded, and for a while, at an early day, the custodian of the proprietors' records and plans, living three or four miles from the 5th division lots, and having one in the same range as defendants' lots, assigned to him as one of the proprietors, told the witness, while at G.'s house, to make a copy of the plan of survey made by direction of the proprietors, that when he should survey in the 5th division he would find two range lines between the lots, and that the west line was the true one. *Held*, that this declaration was admissible: *Id.*

#### BOUNTY.

*Enlistment on Promise of Bounty—Vote to rescind.*—The plaintiff having re-enlisted in the field, to the credit of his town, under an assurance of the authorized recruiting agent of the town, that if he would re-enlist to the credit of said town he would receive such pay as the town paid other soldiers, and the town would probably pay as high as \$500: It was *held*, that he was entitled to the bounty subsequently voted by the town to re-enlisted veterans, and his right could not be defeated by a subsequent vote to rescind: *Haven v. Town of Ludlow*, 41 Vt.

The language of the vote being "to pay to each re-enlisted veteran who has re-enlisted for three years, and who has received no town bounty, \$500, and to increase the bounty of those re-enlisted veterans who have received some bounty to \$500, excepting commissioned officers, and those who have died leaving no families, and deserters;" the plaintiff having received but \$10 under his first enlistment, his right of action accrued upon his re-enlistment and demand and refusal, and having served through his full term and not having received a commission, or died, or deserted, his right of recovery was perfect at the time of trial, in an action brought before his term expired: *Id.*

CONFLICT OF LAWS. See *Decedents' Estate*.

#### CONTRACT.

*Consideration—Fraud.*—A court of law will not set aside a contract for inadequacy of consideration alone. The inadequacy of consideration may be such as to furnish evidence of fraud: *Kidder v. Chamberlin*, 41 Vt.

#### CORPORATION.

While the Constitution requires the debts of corporations to be secured by the personal liability of the corporators, and makes each stockholder liable for his proportion of such debts, it leaves to the legislature the power to regulate such liability, and to prescribe the rule by which

each stockholder's proportion of such debts shall be ascertained: *Larabee v. Baldwin*, 35 Cal.

An act of the legislature making each stockholder of a corporation liable for his share of all its debts contracted while he is a stockholder is sufficient to answer the requirements of the Constitution: *Id.*

There is nothing in the Constitution that renders a man who becomes a stockholder personally liable by so doing for his proportion of all the uncanceled debts of the corporation created before he became a stockholder: *Id.*

In an action against the stockholders of a corporation to recover the proportional share of each one of the corporate debts, the proof must show that the defendant was a stockholder when such debt was contracted. Proof of a judgment against the corporation does not show when the debt was contracted: *Id.*

#### DAMAGES.

*Evidence in Action for Punitive Damages.*—In an action where punitive damages are claimed, on the ground of malice, either party is entitled to prove any facts or circumstances which tend in the slightest degree either to show malice or to rebut the presumption of malice: *Lyda v. Hancock*, 35 Cal.

In such case no fact or circumstance should be excluded unless the court is satisfied to a moral certainty that the jury can draw no rational presumption from it: *Id.*

*Damage to Land by Water Ditch.*—In an action to recover damages for an alleged injury to the plaintiff's land, resulting from the careless management of the defendant's water ditch, which traversed the land: *Held*, that the defendant was bound to exercise no greater care to avoid the alleged injury to the adjoining lands than prudent persons would employ about their own affairs under similar circumstances: *Campbell v. B. R. and A. W. and M. Co.*, 35 Cal.

The true principle applicable to such cases is, that in order to avoid doing a damage to the property of another, a person is bound in law to such care in the use of his own property as a prudent man would employ under similar circumstances, if he were himself the owner of the property exposed to damage: *Id.*

*Breach of Contract.*—Where a party who contracts with another to make lumber for him, and to pay him a fixed sum therefor monthly, as the lumber is made, breaks the contract, without any fault on the other's part, the rule of damages for the breach is the difference between the cost of making the lumber and the contract price: *Hule v. Trout*, 35 Cal.

Where one of the parties to a contract, the performance of which extends through a length of time, refuses to fulfil on his part, and declares the contract at an end, the other may sue for and recover as damages the profits he could have made by the fulfilment of the contract, without waiting for the time to expire: *Id.*

#### DEBTOR AND CREDITOR.

*Sale void as to Creditor.*—The law is perfectly well settled in this state that to render a sale of property void as to a creditor, both the



vendor and vendee must participate in the intent to delay the creditors of the vendor, at least to the extent of the vendee's having knowledge of such intent on the part of the vendor: *Leach v. Francis*, 41 Vt.

#### DECEDENTS' ESTATE

*Commissioners to settle Estates—Creditors—Probate Court.*—Where the creditor of an estate presents his claim to the commissioners appointed by the Probate Court for allowance against the estate, it becomes the duty of the commissioners to take cognisance of the claim, to act upon it, and to include it and their action on it in their report to the Probate Court: *Dickey v. Corliss, Adm'r.*, 41 Vt.

Where the creditor has duly presented his claim to the commissioners and they intimate nothing to him adverse to its allowance, and the administrator makes no defence or objection, the creditor is justified in resting in the belief that his claim was allowed: *Id.*

When commissioners, without the fault of the creditor, have failed to report a claim to the Probate Court, duly presented before them for allowance, it is the province of the court of equity to save the creditor from his pending loss by holding the estate still bound to do what the law would compel it to do, but for the omission of the commissioners to do their duty, and in this respect the court of equity will be occupying its own peculiar province and not assuming that of the Probate Court: *Id.*

*Administrator—Estate in different Jurisdictions.*—A person having died in another state, the place of his residence, leaving a portion of his estate there and a portion in this state, claims may be prosecuted against the portion here the same as though the sole administration of the estate was in this state, unaffected by the fact that they could have been prosecuted against the portion in such other state. In such case the running of the Statute of Limitations is suspended, as in other cases during the time between the death of the party and the appointment of the administrator here: *Hicks, Adm'r., v. Clark, Adm'r.*, 41 Vt.

A claim is not merged in a bond in which the obligor stipulates that "such payment of \$300, or the *pro rata* share thereof as aforesaid, shall be a release and discharge," &c. In such case the payment, and not the giving of the bond, is to be the release and discharge of the claim: *Id.*

#### DITCHES AND DITCH COMPANIES.

*Evidence—Mode of proving Value of Ditch.*—The ordinary and proper mode of proving the value of a water ditch is by showing its capacity, the market value of water in the vicinity, and the probable duration of the demand: *Clark v. Willett*, 35 Cal.

In such case evidence of the value or profits of certain mining claims belonging to the owners of the ditch and supplied therefrom with water to mine the same, is inadmissible in evidence to establish the value of the ditch, unless accompanied by further evidence showing that the claims could not be worked without the aid of the ditch: *Id.*

*Sale of Water.*—Unincorporated ditch companies, organized for the sale of water to miners and others, the stock in which is bought and sold at the pleasure of the owners, without consulting the co-owners,

differ from ordinary commercial partnerships. Some of the incidents of a partnership pertain to such companies, and some of mere tenancies in common likewise pertain to them: *McConnell v. Denver*, 35 Cal.

A member of such a company has no general authority by virtue of such membership to bind the company by his contracts: *Id.*

The superintendent or managing agent of such company has no authority to bind the company by a promissory note, given for materials used by the company, unless the authority to give such note is expressly conferred upon him by the company, or such authority may be implied from his acts recognised by the company, with full knowledge of the acts at the time of the recognition: *Id.*

If an unincorporated ditch company duly authorizes its superintendent to give the company note for materials before then purchased by the company, all the members are bound by the note, whether they were such members when the materials were purchased or not: *Id.*

If lumber is furnished a ditch company under the agreement that it is to be paid for out of the proceeds of the ditch of the company, and the proceeds have all been faithfully applied in payment, according to the agreement, the person who furnishes it is not entitled to recover the deficiency against the members of the company: *Id.*

#### EJECTMENT.

*Joint Liability.*—If one of two defendants, with the knowledge and consent of the other, employs men to remove buildings and fences from land, turn out the occupants, and take possession, the acts performed and possession so acquired are as much the acts and possession of the one who assented to them in advance, and for whose benefit in part such possession was taken and held, as of the party who actually employed the men and directed the acts to be done: *Treat v. Reilly*, 35 Cal.

*Judgment—Of what conclusive.*—A judgment for plaintiff in ejectment is not conclusive except as against defences actually made, or legal defences that might have been made on the trial, and does not preclude a defendant from asserting a title subsequently acquired: *Munn v. Rogers*, 35 Cal.

Where a plaintiff has been restored, under a writ of restitution, to the possession of the demanded premises in an action of ejectment, the defendant so evicted is ever after estopped at law to deny that plaintiff was rightfully restored, and that his own prior possession was wrongful: *Id.*

*Judgment—Improvements set off against Damages.*—Where an intestate was a tenant in common with the plaintiff in ejectment in the demanded premises, and the defendant entered upon the premises with the permission of the administrator of the deceased co-tenant, the entry of the defendant is not tortious, and the plaintiff is not entitled to a judgment for possession of all the land, but only for his undivided interest: *Carpentier v. Small*, 35 Cal.

The right of a defendant in ejectment to set off the value of improvements made by him, against the claim of the plaintiff for damages, depends upon whether they were made by him or his grantors holding under color of title adverse to plaintiff, in good faith, and upon whether they are permanent or not: *Id.*

## ESTOPPEL.

*Between Landlord and Tenant.*—The doctrine of estoppel, which may be said to be founded upon the adage that "the truth is not to be spoken at all times," is a harsh one, and is never to be applied except where to allow the truth to be told would consummate a wrong to the one party or enable the other to secure an unfair advantage: *Franklin v. Merida*, 35 Cal.

If A., being in possession of land, deliver the possession to B. upon his request and upon his promise to return it, with or without rent, at a specified time or at the will of A., B. cannot be allowed, while still retaining the possession, to dispute A.'s title; but it is otherwise if B. is in possession and takes a lease from A., since the latter parts with nothing, and the former has obtained nothing by the transaction: *Id.*

The bare possession by the tenant of the demised land at the time the lease is given is sufficient to take the case out of the operation of the general rule, that the tenant cannot, before surrendering possession, dispute the landlord's title. *Tewksbury v. Magraff*, 33 Cal. 237, affirmed: *Id.*

EXECUTOR. See *Decedents' Estate*.

## FELONY.

*Effect, civilly, of Conviction for Felony.*—The forfeitures and disabilities imposed by the common law upon persons attainted of felony, are unknown to the laws of this state. No consequences follow a conviction of felony, except such as are declared by statute: *Estate of Nerac*, 35 Cal.

One sentenced to the state prison for a felony, for a term less than his natural life, is not dead in law. His civil rights in some matters are suspended, but the rights of his creditors are not suspended: *Id.*

## FRAUDS, STATUTE OF.

*Assumpsit—Joint Purchase—Consideration.*—The defendant having bargained with N. for his farm, stock, and produce, agreed with the plaintiff that they together would carry out the contract with N., sell the property in a short time, and divide the profits. The defendant took no deed of the farm, but had it deeded by N. directly to the persons to whom the plaintiff and defendant sold it in parcels, and all the property was sold in N.'s name. The defendant received the proceeds of the sales: *Held*, that the plaintiff could maintain an action of *assumpsit* to recover of the defendant his share of the profits: *Bruce v. Hastings*, 41 Vt.

*Held*, that the agreement between the plaintiff and defendant to sell and divide profits, though not in writing, was not within the Statute of Frauds: *Id.*

*Held*, that the plaintiff having advanced money to the defendant to be paid to N. for the property, and having otherwise aided the defendant in the purchase and sale of the property, relying upon the defendant's promise to give the plaintiff a portion of the profits, the agreement was founded on sufficient consideration: *Id.*

## INNKEEPER.

*Bailment.*—The plaintiff, who was a minor, went with his father, with a horse and wagon, to the inn kept by the defendant, to attend the trial of a suit which the innkeeper had brought against the father. When they arrived the horse and wagon were delivered to the servant of the defendant, to be put up and taken care of; and the plaintiff and his father entered the inn where the defendant was in charge, and laid aside their overcoats in the room where they entered, and in presence of the defendant. In due time the father called for dinner for himself and the plaintiff, which they had; and they remained at the inn until evening, when the bill was paid and they left. *Held*, that the relation of innkeeper and guest was thereby created between the plaintiff and the defendant: *Read v. Amidon*, 41 Vt.

A guest is not relieved from all responsibility in respect to his goods on entering an inn. He is bound to use reasonable care and prudence in respect to their safety, so as not to expose them to unnecessary danger of loss: *Id.*

A guest having laid his gloves down under his overcoat on a bench in the presence of the innkeeper, it was a question of fact to be determined by the jury in view of all the circumstances, whether he was so careless with respect to his gloves as to exonerate the innkeeper from liability for their loss: *Id.*

## JUDGMENT.

*Alteration of the Record by the Court—Entry of New Judgment.*—There is no doubt but the county court, within certain limits, has such power over its records and judgments as to warrant it in ordering them corrected, and, if necessary, for sufficient reasons to order a case to be brought forward after final judgment, and vacate that judgment, and open the case for further proceedings. In such case, it is ordinarily so far a matter of discretion in the county court, that the Supreme Court will not revise such proceedings on exception: *Smith & Handscomb v. Howard*, 41 Vt.

At the next term of the court after a final judgment had been rendered in an action of *assumpsit*, upon motion of the plaintiffs and against the objection of the defendant, the old judgment was brought forward and a new judgment rendered for the same damages with interest on the damages for the intervening time, for the purpose of charging the bail, who had been discharged through failure of the clerk to issue an execution against the defendant's body. *Held*, that the vacating of the old judgment was erroneous: *Id.*

The plaintiffs, or their counsel, desired the execution on the first judgment to run against the body of the defendant, but neglected to direct the clerk so to issue it, and the execution ran against the goods, &c., instead of against the body, and was returned *nulla bona*. *Held*, that if the plaintiffs were entitled to an execution against the body, they should have called for such; that it was not the fault of the clerk that the execution did not run against the body. It being an action of general *assumpsit*, the plaintiffs were entitled *prima facie* only to such an execution as the clerk issued: *Id.*

It is no part of the official duty of the clerk to issue an execution until it is called for by the party entitled to it: *Id.*

#### LANDLORD AND TENANT. See *Estoppel.*

*What Damages Tenant bound to Repair.*—If the embankment of a natural reservoir, which is filled with water by unusual rains, is broken by a stranger, so that the demised premises are injured by the water, the injury is not the act of God or of the elements, and the tenant is bound to repair, even if "damages by the elements or acts of Providence" are excepted from his covenant: *Polack v. Pioche*, 35 Cal.

A general covenant of the tenant to repair the demised premises is binding upon the tenant under all circumstances, even if the injury proceeds from the act of God, from the elements, or from the act of a stranger: *Id.*

#### MASTER AND SERVANT.

*Contract—Tender—Damages.*—Where a laborer leaves his employer before his term of service has expired and without his employer's consent, and the employer, although insisting that he does not admit his liability, offers to pay him for his labor at the rate he would have received if he had labored until the end of the time agreed upon, or makes a tender of the amount due at that rate, he (the employer), both by his offer of payment and by his tender, waives the forfeiture of the wages for the services performed. But the laborer is not entitled to recover more than the contract price, in any view of the case, unless he had good cause for leaving: *Putnote v. Sanders*, 41 Vt.

The laborer, having left voluntarily, although by the consent and acquiescence of the employer, can recover only *pro ratâ* on the basis of the contract price; and the employer, under the circumstances, is not entitled to recover damages: *Id.*

The tender was intended to be in accordance with the above rule of compensation, but by mistake was ten dollars less than the amount due under the rule. *Held*, that it must be regarded as the mistake and misfortune of the employer, and could not have the same legal effect on the rights of the parties in the case, that it would have had if it had been a tender of the amount intended: *Id.*

#### MINING CUSTOMS.

*Proof of.*—On the trial of an action to quiet the title to a mining claim, the plaintiffs' title depended upon maintaining their allegation, that by the custom prevailing among the miners of the district embracing their claims, the mode of locating claims therein was for the locators to measure off and designate by stakes on the ground their boundaries, to enter upon the occupation of the same, and to cause a record thereof to be made of such location, in the county recorder's office: *Held*, that the contents of a book kept in said recorder's office, consisting of the records of numbers of such locations—among which, and the first in the order of their registration, was the record of plaintiffs' claim—was properly admitted in evidence as tending to prove such allegation: *Pralus v. Pacific G. and S. M. Co.*, 35 Cal.

## PARENT AND CHILD.

*Enlistment—Emancipation—Soldier's Pay and Bounty.*—A minor having enlisted into the military service of the government, with the consent of his father, is entitled to receive and control such compensation as he is entitled to from the government or otherwise, under his enlistment contract; and the town bounty paid by the town to which he gave his credit, belongs to him and not to the father: *Baker v. Baker*, 41 Vt.

The consent to the minor's enlistment is a virtual emancipation or discharge of the minor from all obligations of service or obedience to the father, so long, at least, as the enlistment contract exists: *Id.*

But in this case, which was as to whether a town bounty belonged to the father or the son, even if the father had a right to claim the money, there being evidence tending to show that he had relinquished all claim to it and recognised the right of the son to it, and to control it, the case should at least have been submitted to the jury: *Id.*

PARTITION. See *Tenant in Common*.

*Where Improvements have been made by the Co-tenants separately.*—In an action for partition by one tenant in common of lands granted his co-tenants, where the tenants have severally made valuable improvements on distinct portions of the land sought to be partitioned, the court, by way of interlocutory decree, ordered "that there be set off to the several parties such portions of the premises as will include their respective improvements; provided always, that the rights or interests of neither of the other parties be prejudiced thereby." *Held*, that the order declared the proper rule to govern in such cases, and that the judgment would not be disturbed unless the rule had been departed from: *Seale v. Soto*, 35 Cal.

## PARTNERSHIP.

*Dissolution.*—Where one partner has the management of the partnership affairs, and makes false entries in the books, and defrauds his co-partner of a portion of the partnership receipts, and retains the same to his own use, the partner thus defrauded is entitled to a dissolution of the partnership and an accounting, even if the partnership was by agreement to continue for a fixed term and the term has not expired: *Cottle v. Leitch*, 35 Cal.

If in such a case there has been an accounting between the partners, and the partner defrauded does not discover the fraud until after the accounting, he may sue for an accounting and dissolution, and on the trial may surcharge and falsify the account, without demanding a reaccounting prior to the commencement of the action: *Id.*

PROBATE COURT. See *Decedents' Estate*.

## PROMISSORY NOTE.

*Intoxicating Liquors.*—A promissory note payable on demand with interest, given for intoxicating liquor bought by the maker, of the payee, to be sold in violation of law, and made under such circumstances that, as between the original parties, it could not be enforced,

and negotiated in due course of business ten months after it was executed, to an innocent holder, for value, who was ignorant of the consideration for which it was given, was *held* to be past due when negotiated; therefore subject to all defences that would have been available if the suit had been by the original payee: *Morey v. Wakefield*, 41 Vt.

*Assignment.*—The delivery of a promissory note payable to bearer by its holder and owner, with a right to collect it and use the avails as needed; is an assignment of it: *Cox's Executors v. Mathews*, 41 Vt.

Such a delivery by no means constitutes an agency, or confers upon the holder a mere power of attorney, which is revoked upon the death of the person who delivers it: *Id.*

If at the time of the delivery there was an express understanding that at the death of the person giving it, it should be surrendered to the executor of the deceased if uncollected, it is still an assignment—but an assignment with a limitation—and if the limitation does not appear upon the note itself, the maker of it who has paid it in ignorance of the understanding could in no way be affected by it: *Id.*

#### REPLEVIN.

*Right of Action.*—Under the statute (Gen. Sts., p. 320, § 13), the right to the possession, not ownership, as against the defendant only, not others, is all that is necessary to maintain replevin: *Sprague, Adm.*, v. *Clark*, 41 Vt.

A person in possession of property claiming it, or an interest in it, or a legal right to the possession, may maintain replevin against any person taking the property from him, who cannot show a better right to it. The defendant can prevail only when it appears that he is entitled to a return of the property, and that can be only when it appears that his right is superior to that of the plaintiff: *Id.*

This action can be maintained as an adversary proceeding only by force of the statute: *Id.*

#### TENANT IN COMMON.

*Conveyance by less than all the Owners.*—A conveyance by one tenant in common, or any number of them less than the whole, of a specific portion of the common lands is not void, but cannot be made to the prejudice of the tenants not uniting in the conveyance: *Gates v. Salmon*, 35 Cal.

The grantee at such sale acquires all the interest of his grantor in such special tract, which interest is a tenancy in the special tract with the co-tenants of his grantor: *Id.*

Such conveyance does not sever the special tract from the general tract of which it is a part so far as the co-tenants of the grantor are concerned, and the whole tract is subject to partition, so far as the co-tenants of the grantor are concerned, as it would be had the conveyance of the special tract not been made: *Id.*

#### TRESPASS.

*Service of Process—Authority of Special Officer.*—A person specially authorized to serve process has no authority except that conferred by his deputation; he is entitled to and can claim no respect, considera-

tion, or obedience by reason of his being in a public position until he makes his authority known, or until it is known to those with whom he is dealing; and until then the owner of property which the authorized person is undertaking to attach and carry away, may treat him as a mere trespasser, and protect it against him. But if he resist, having such knowledge, and the authorized person is injured by him, he is liable in an action of trespass for an assault and battery: *Leach v. Francis*, 41 Vt.

L., an officer, accompanied by C., the execution-creditor, had attempted to levy upon a mare which F., the debtor, had sold to W., and had been resisted by F. and W., and the mare escaped during the affray, and afterward W. mounted her and rode off. L. then directed C. to take hold of F., and hold him while he went after W. and the mare, which he did. *Held*, that as the execution did not run against F.'s body, and as he did not interfere or threaten to interfere with L.'s going after the mare, this imprisonment of F. was a trespass, and having been done by C. by L.'s direction, both were liable for it: *Id.*

#### VENDOR AND VENDEE. See *Debtor and Creditor*.

*Contracts to convey Real Estate on Payment of Purchase Price—Covenants of, when dependent.*—In a contract for the sale of real estate, where the purchaser covenants to pay the purchase-money, and the vendor covenants to convey the premises at the time of payment, or upon the time of the payment of the money, or as soon as it is paid, the covenants are mutual and dependent, and neither can sue without showing a performance, or an offer to perform on his part. Performance, or an offer to perform, on the one part, is a condition precedent to the right to insist upon a performance on the other part: *Hill v. Grigsby*, 35 Cal.

Where the purchase-money is payable in instalments, and the conveyance is to be executed on the last day of payment, or on the payment of the whole price, or at any previous day, the covenants to pay the instalments falling due before the time for the execution of the conveyance are independent covenants, and suit may be brought thereon without conveying or offering to convey: *Id.*

The covenants to pay the instalments falling due on or after the day appointed for the conveyance are dependent covenants; and the vendor, in his suit to recover the same, whether he sues for those alone, or joins instalments that became due before the time, must show a conveyance or offer to convey: *Id.*

Where H. agreed to execute and deliver to G. and S. a good deed, conveying all the right, title, and interest of H. in and to one undivided half interest in a certain mill and premises—said deed to be sufficient to convey one undivided half interest in and to said property, free of encumbrance, "upon condition" that G. and S. should pay to H., in specified instalments, the sum of nine thousand and eight hundred dollars, with certain interest, said deed to be executed as soon as said sums are paid: *Held*, first, that the execution of the deed and the payment in full of said sums were intended to be simultaneous acts, and the covenants for their performance are dependent covenants; second, that in an action by H. against G. and S., after all said instalments had fallen



due, to recover said sums, H. could only recover on delivery, or tender of delivery of said deed; and, third, that the covenant of H. to convey would be satisfied by a conveyance or tender thereof of the right, title, and interest which H. had in the undivided half of said property at the date of said agreement: *Id.*

#### WILL.

*Proof by Copy.*—A copy of a will may, under certain circumstances, be proved as the will of a deceased person. Therefore, a plea in which the only fact alleged as an objection to the probate of a will, was that "the instrument sought to be established, purports to be only a copy of the will of," &c., *held* insufficient upon general demurrer: *Dudley v. Wardner's Exr.*, 41 Vt.

A plea that "said instrument or writing ought not to be admitted to probate, because the same is not entitled to probate as the last will and testament of," &c., also *held* insufficient, it being merely the statement of a conclusion, opinion, or inference, without the allegation of any fact on which it is based: *Id.*

The question can be determined only upon trial, whether the copy presented can be established: *Id.*

#### LIST OF NEW LAW BOOKS.

ANDREWS.—The Trial of S. M. Andrews for Murder of C. Holmes. By C. G. DAVIS. N. Y.: Hurd & Houghton. Cl. \$2.50.

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## THE POWER OF THE PRESIDENT TO GRANT A GENERAL PARDON OR AMNESTY FOR OFFENCES AGAINST THE UNITED STATES.

THE proclamation of President Johnson of 25th December 1868, purports to grant full pardon and amnesty to all persons engaged in the late rebellion, for the offence of treason against the United States, or of adhering to their enemies during the late civil war. This proclamation, practically, could only benefit those offenders described in it who, at the time it was issued, were under indictment in the courts of the United States, and these were very few in number. In respect to all others (except those "fleeing from justice"), the Statute of Limitations, which limits the period for the finding of an indictment for treason to three years next after the act of treason (Act of 30th April 1790, § 32, U. S. Stats. at Large, vol. 1, p. 119), has long since served as an act of amnesty, full, complete, and without condition or exception. But the authority of the President to issue this proclamation has been called in question and denied in a report of the Judiciary Committee of the Senate of the United States, made by Senator Edmunds on the 17th February last; and, as every question involving the nature and limits of a grant of power conferred by the Constitution on any branch or department of the government is always entitled to a careful and candid examination, the reasons assigned for the conclusion of the committee that the President

cannot, by proclamation, *without the authority or assent of Congress*, grant general pardon or amnesty, and that, consequently, this proclamation was not authorized by the Constitution or laws, challenge a respectful consideration. The question is, whether the granting of general pardon or amnesty was within the power vested in the President by the Constitution; and *not* whether, allowing this power to be thus vested in the President, its exercise in the particular case was judicious or expedient. It will be conceded by all that the power which the Constitution grants to the President is an inseparable incident to the presidential office, and that it is the same in measure and degree at all times, by whomsoever that office may be held.

The Constitution of the United States (Art. 2, § 2) provides that the President "shall have power to grant reprieves and pardons for offences against the United States except in cases of impeachment." By § 13 of chap. 195 of the Public Acts of the Second Session of the 37th Congress, entitled "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," approved July 17th 1862, it was provided as follows, viz. :—

"Sec. 13. *And be it further enacted*, That the President is hereby authorized, at any time hereafter, by proclamation, to extend to persons who may have participated in the existing rebellion in any state or part thereof, pardon and amnesty, with such exceptions and at such time and on such conditions as he may deem expedient for the public welfare:" U. S. Stats. at Large, vol. 12, p. 592.

This 13th section of the Act of 17th July 1862 was repealed by chap. 8 of the Public Acts of the Second Session of the 39th Congress, which took effect on the 19th January 1867, by not having been returned by President Johnson to the House of Congress in which it originated, within the ten days prescribed by the Constitution, whereby it became a law without his approval. But if the President, independently of the section thus repealed, was invested with the power to grant pardon and amnesty for offences against the United States, his power would remain the same after this section was repealed as it existed before the repeal. If the power was conferred on him by the Constitution, that section, when it became a law, did not add anything to his constitutional power; and, when it was repealed, the repeal could not diminish or lessen that power. No statute law can take away from the

President a power conferred upon him by the Constitution. If, on the other hand, the power of the President to grant pardon and amnesty for offences against the United States in the recent rebellion is not vested in the President by the Constitution, and cannot be exercised *without the authority or assent of Congress*, then, by reason of the repeal of this section, the three proclamations of pardon and amnesty issued by the President on 7th September 1867, 4th July 1868, and 25th December 1868, were severally issued without authority from the Constitution or the laws, and can have no legal efficacy or effect whatever. The question is therefore presented, whether the constitutional power of the President "to grant pardon for offences against the United States," includes the power to grant an amnesty or general pardon for the same offences? And here the definition of the terms *pardon* and *amnesty* becomes necessary.

"A *pardon*," says Chief Justice MARSHALL, in the case of *United States v. Wilson*, 7 Peters 150, "is an act of grace proceeding from the power intrusted with the execution of the laws which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed." Worcester defines *pardon* as being "the remission of a fault or crime, or of a penalty; forgiveness; absolution; acquittal." Webster defines it as being, (1.) "Forgiveness; the release of an offence, or of the obligation of an offender to suffer a penalty, or to bear the displeasure of the offended party. We seek the *pardon* of sins, transgressions, and offences. (2.) Remission of a penalty. An amnesty is a general *pardon*. (3.) Forgiveness received." *Amnesty* is defined by Worcester as "an act of oblivion or indemnity; a general pardon or freedom from penalty granted to those guilty of some crime or offence;" and Webster defines the same word as being "an act of oblivion; a general pardon of the offences of subjects against the government, or the proclamation of such pardon." In Lieber's *Encyclopædia Americana*, *amnesty* is defined as "an act of oblivion; the entire freedom from penalty granted to those who have been guilty of any neglect or crime, usually on condition that they return to their duty within a certain period." Bouvier, in his *Law Dictionary*, in defining *amnesty*, makes a distinction or difference between *amnesty* and *pardon*, both in their nature, application, and effect; and yet, in defining *pardon*, he says that general pardons are express, when an act

of the legislature is passed expressly directing that offences of a certain class shall be pardoned, *as in the case of an act of amnesty*, and that special pardons are those which are granted by the pardoning power for particular cases. It is very properly said in the report of the Senate Judiciary Committee that "the objects of a general pardon or amnesty are whole classes of the community whose united or concurrent misdeeds in promoting a common design have brought them under the law, and whose treatment is necessarily a question of government and security to society, depending upon political considerations which belong alone to the sovereign power." *Amnesty* is a word of Greek derivation, and is an exact synonym or equivalent of the word *oblivion*, which is of Latin derivation. From these definitions it will be seen that those who claim that the President, though having power to grant *pardons*, has no power to grant amnesty, for offences against the United States, are compelled to interpret the words of the Constitution which invest him with "power to grant pardons," as giving him only a power to grant *special* pardons, but no power to grant *general* pardons.

The power of pardon conferred by the Constitution on the President is plenary and unlimited; except in cases of impeachment. It is coextensive with the power to punish, and extends to every offence known to the law; and it may be exercised at any time after the commission of the offence, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. Its exercise, and the mode of its exercise, are placed, without condition or limitation, wholly in the discretion of the President, and it is not subject to legislative control. It includes the power to grant conditional as well as absolute pardons, and of commuting to a milder punishment that which has been adjudged against the offender. These propositions are fully supported by decisions of the Supreme Court of the United States in the cases of *United States v. Wilson*, 7 Peters 150; *Ex parte Wells*, 18 How. 307; and *Ex parte Garland*, 4 Wall. 333. The power of pardon may be exercised even after the full punishment awarded for the offence has been suffered, if any of the legal consequences of the conviction remain. In *United States v. Jones*, 2 Wheeler's Crim. Cas. 451—in the United States Circuit Court in New York city, per THOMPSON, J.—it was held that a person convicted of a felony, and pardoned after he had suffered the entire

punishment awarded against him, was restored by the pardon to competency as a witness; and KANE, J., in *United States v. Stetler*, in the United States Circuit Court in Philadelphia, February 1862, expressed the same opinion, and added that "in very many cases, the consequential disability is the most painful incident of the conviction:" Wharton's Amer. Criminal Law, 4th ed., § 766, note.

It was formerly doubted whether a pardon could do more than take away the punishment, leaving the crime and its disabling consequences unremoved. But it has long been settled that a pardon, whether by the king or by an Act of Parliament, removes not only the punishment but all the legal disabilities consequent on the crime. "The king's pardon doth not only clear the offence itself, but all the dependencies, penalties, and disabilities incident unto it:" *Cuddington v. Wilkins*, Hobart's Rep. 81, 82. "The king's pardon takes away *pœnam et culpam in foro humano*," so as to render an infamous man a competent witness, and, "though it restores not the blood, yet, as to issues born after, it hath the effect of a restitution:" Hale's Pleas of the Crown, vol. 2, p. 278; vol. 1, p. 358; 2 Russell on Crimes 975. "A pardon reaches both the *punishment* prescribed for the offence and the *guilt* of the offender, and when the pardon is full, it releases the *punishment* and blots out of existence the *guilt*, so that in the eye of the law the offender is as innocent as if he had never committed the offence. \* \* There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in consequence of a conviction and judgment:" *Ex parte Garland*, 4 Wall. 333. In *Baum v. Clause*, 5 Hill 196, BRONSON, J., disapproves of the case above cited from Hobart, so far as it affirms that a pardon takes away the guilt as well as the punishment of the offence; but in this he is clearly in opposition to the whole current of English authority for the last two hundred and fifty years.

The language used in the Constitution in conferring on the President the power "to grant pardons," must be construed by the exercise of that power in England prior to the Revolution, and in the states prior to the adoption of the Constitution: *Ex parte Wells*, 18 How. 307. In *United States v. Wilson*, 7 Peters 150, MARSHALL, C. J., says: "As this power had been exercised from time immemorial by the executive of that nation whose language

is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it "

The report of the Senate Judiciary Committee presents two propositions or statements of historical fact as the basis or foundation of its entire argument in support of the conclusion that the President has no power to grant general pardon or amnesty for offences against the United States, by proclamation, without the authority or assent of Congress, viz.:—(1.) That the power of general pardon by proclamation did not exist, and was not claimed by any English sovereign, after Great Britain had a constitution and a settled jurisprudence; "although it was frequently exercised *under and by Acts of Parliament* from the earliest years of the reign of Elizabeth (1535<sup>1</sup>), until after the American Revolution," from which "the clear conclusion is, that under the English system of government, no power, either of amnesty or general pardon" [*sic*] "existed in the king;" and, (2.) That the knowledge of these legal terms, *amnesty* and *pardon*, and of their settled meaning and effect, must have existed in the Constitutional Convention of 1787, and that the convention, by not using the word *amnesty* in the article conferring power on the President "to grant *pardons*," must be understood as intending not to invest him with any power to grant *amnesty* for offences against the United States. These statements are vital to the argument, and deserve examination.

In England, one of the inseparable incidents of a conviction and judgment for treason or other capital crime was *attainder*, the consequences of which were forfeiture of real and personal estates and corruption of the blood; whereby the attainted person could neither inherit lands from his ancestors, nor retain those he was already in possession of, nor transmit them by descent to any heir, and he also obstructed all descents to his posterity wherever they were obliged to derive a title through him to a remoter ancestor. He could not be heir to any ancestor, nor his children heirs to him, nor to any of his ancestors, from whom they could not claim but through him. In this way, the sins of

the fathers were visited upon the children, not merely to the third and fourth generation, but to the end of time. The king's pardon was always held sufficient to acquit the offender of all corporal penalties and forfeitures annexed to the offence for which it was granted, and could restore to him his forfeited goods and chattels, but not his lands. Even if granted after conviction, but before judgment, it was sufficient to prevent attainder, which attached to the judgment and not to the conviction. But by the corruption of the blood the rights of private subjects became affected; and the blood, when once corrupted, could not be purified or restored except by the authority of Parliament. Hence arose the necessity for a resort to the power of Parliament to effect a restoration of the blood after attainder. In this country, attainder, with all its incidents and consequences, is practically unknown. In England, corruption of the blood was abolished in all cases except the crimes of high treason and murder by statute of 54 Geo. 3, c. 145; and by statute of 3 & 4 Will. 4, c. 106, § 10, it was enacted that corruption of blood on attainder shall not obstruct descents to the posterity of the offender where they are obliged to derive a title through him or her to a remoter ancestor,—thus in effect almost realizing the hope expressed by Blackstone (4 Comm. 388, 440), “that corruption of the blood may one day be abolished and forgotten.”

The report of the Senate Judiciary Committee says that *pardon* and *amnesty* “are words which have been known and used in the law for hundreds of years, and that their scope and meaning has never been the subject of dispute;” and, while contending that these words “import widely different things,” concedes that an act of *amnesty* is an act of *general pardon*. But it may be doubted whether the word *amnesty* should be considered as a term of the law in the same sense that the word *pardon* is. It is not to be found in any statute, and is not often used by the text writers of the English law; and whenever it is used, it is as a term of English lexicography, and not as a technical term of the English law.

The king's power of pardoning was said by our Saxon ancestors to be derived from the law of his own dignity (*a lege suæ dignitatis*); and it was declared in Parliament by statute of 27 Hen. 8, c. 24, that no other person hath power to pardon or remit any treason or felonies whatsoever, but that the king hath the whole and sole power thereof united and knit to the imperial crown of the



realm: 4 Black. Comm. 397. In *The King v. Parsons*, Holt's, Rep. 519, HOLT, C. J., says:—"The power of pardoning all offences is an inseparable incident to the crown; and it is equally for the good of the people that the king should pardon as that he should punish. \* \* The king, by his coronation oath, is to show mercy as well as to do justice." By the English constitution, the sovereign power of the realm is considered as existing in Parliament, of which the king, as well as the lords and commons, is a constituent part,—he having a negative upon the acts of the lords and commons as absolute as that which each house of our Congress has over the acts of the other,—and no act can become a law without the consent of the king, as well as of the lords and commons. Whatever can be done in this country by the people in convention may be done in England by an Act of Parliament. An Act of Parliament may be *unprecedented*, but it can never be *unconstitutional*. It may alter the succession to the crown, and even change the whole structure of government. Blackstone speaks of the power of Parliament as being "high and transcendent:" 4 Comm. 402, 1 Id. 189; and De Lolme, in his work on the Constitution of England (p. 134, note), facetiously says that "it is a fundamental principle with English lawyers that Parliament can do everything *except* making a woman a man, or a man a woman." No more significant illustration of the sovereign power of Parliament can be given than is furnished by those acts which are called bills of attainder. These parliamentary judgments of doom, though a disgrace to a country having a settled jurisprudence and the regular administration of the law, are to be found in nearly every period of English history.

It cannot be questioned that a general pardon by Act of Parliament, applicable to whole classes of the community, is more beneficial than a special pardon by the king's charter to a particular person of one of those classes, or that it has always been so regarded. The courts must take judicial notice of such a general pardon, when it is full and unqualified, as of any other public Act of Parliament; and a man is not bound to plead it, neither can he lose the benefit of it by his own laches or negligence, as he may of the king's charter of pardon. A pardon by Act of Parliament usually, though not necessarily or invariably, contains clauses restoring the blood, when corrupted, and taking away all the other consequences of attainder, if applicable to any

persons attainted, which the king's charter of pardon could not do; and where it is full and absolute, or without qualification or exception, the courts are obliged to take notice of it, even though the party waives it or does not plead it. The king's charter of pardon, on the contrary, must be specially pleaded, and that at a proper time; and, if not so pleaded, the benefit of it is thereby waived and lost. So if a pardon by Act of Parliament contains exceptions of offences or persons, the court cannot take notice of it, neither can the party have the benefit of it, unless by pleading he shows that he is not one of the persons excepted, though commonly advantage is given to the offender by the act itself without pleading: Wood's Institute of the Laws of England (9th ed., folio, London, 1763), p. 660. For these reasons, a pardon by Act of Parliament is more beneficial and desirable than a pardon by the king's charter; and hence the occasion of pardons by Act of Parliament.

The occasions for the exercise of the power to grant pardon or amnesty in favor of whole classes of community, whether by the king's charter or by Act of Parliament, arose nearly always from political offences in insurrections or rebellions against the existing government; and these have not been of frequent occurrence in English history. A general pardon by Act of Parliament is called by writers on English law an act of grace—the same name or term applied by Chief Justice MARSHALL in *United States v. Wilson*, 7 Peters 150, to a pardon granted by the executive authority to a particular person by name. Sometimes, though improperly, it has been called an act of indemnity. Acts of indemnity are passed, as much of course as the supply bills, at every session of Parliament, for the relief of those who have neglected to take the necessary oaths, &c., required to qualify them for their respective offices, and may be initiated in the Lords or Commons; but an act of grace always originates with and proceeds from the king. Thus, the Act of 1 Will. & Mary, sess. 2, c. 8 (1689), entitled "An act for preventing vexatious suits against such as acted in order to the bringing in their majesties, or for their service," was an act of indemnity. Macaulay, in his History of England, vol. 3, p. 442 (Butler's Philadelphia ed., 8vo.), says:—"Between an act of grace originating with the sovereign and an act of indemnity originating with the estates of the realm there are some remarkable distinctions. An act of indemnity passes

through all the stages through which other laws pass, and may, during its progress, be amended by either House. An act of grace is received with peculiar marks of respect, is read only once by the Lords and once by the Commons, and must be either rejected altogether or accepted as it stands." One of the "peculiar marks of respect" with which an act of grace is received by the Houses of Parliament, as stated by Macaulay (same vol., p. 443), is, that each House stands up uncovered while the act of grace is read. Blackstone (Comm., vol. 1, p. 187) says that "when an act of grace or pardon is passed, it is first signed by his majesty, and then read once only in each of the Houses, without any new engrossing or amendment;" and that when it has received the sanction of the two Houses of Parliament, as it "originally proceeds from the crown and has the royal assent in the first stage of it," the clerk of the Parliament pronounces to the king "the gratitude of the subject in Norman-French words, translated as follows:—'The prelates, lords, and commons in this present Parliament assembled, in the name of all your other subjects, most humbly thank your majesty, and pray to God to grant you in health and wealth long to live:'" Id., p. 188.

It is stated in the report of the Senate Judiciary Committee that the power of general pardon "was frequently exercised *under and by Acts of Parliament* from the earliest years of the reign of Elizabeth until after the American Revolution." As has been already remarked, the occasions for the exercise of this power, whether by the king's charter or by Act of Parliament, have not been frequent in English history; but this statement need not be questioned in any other respect. This power was exercised *under and by Acts of Parliament* eleven times during the reign of Elizabeth, and only nine times from the close of her reign in 1603 to the period of the American Revolution. The exercise of this power under and by Acts of Parliament can be traced to a period nearly two hundred years earlier than the reign of Elizabeth: and the power was probably exercised under and by Act of Parliament from the very earliest period of parliamentary history, and certainly at a period as far remote as that in which attainder with its consequences became a part of the English law. Previous to the first year of the reign of Henry VIII., Acts of Parliament had no distinct titles, there being only a general title for all the acts passed in the session; but in that year, distinct titles were

introduced for each act or chapter: 1 Black. Comm. 187. In ancient editions of the Statutes at Large, the substance only of such acts or chapters as were of a temporary character, or had become obsolete, is published; and, consequently, none of these acts of grace or pardon are now to be found published at length, even in editions of the Statutes at Large which must now be regarded as ancient, prior to the act passed on the restoration of Charles II., in 1660 (12 Car. 2, c. 11); and the practice of stating the substance of the several chapters or acts when they were not published at length was continued in ancient editions of the Statutes at Large long after distinct titles were introduced for each chapter.

The earliest Act of Parliament of this character of which any trace is now to be found in the Statutes at Large was passed in 1376, in the fiftieth year of the reign of Edward III., the father of Edward the Black Prince. The substance of this act (50 Edw. 3, c. 3) is stated in ancient editions of the Statutes at Large as follows:—"This being the year of the King's Jubilee, he doth grant pardon to his people of alienations without license, intrusions, fines, amerciements, issues, forfeitures, reliefs, escuages, debts, accounts, the suit of his peace, except, &c." This act was confirmed by Act of 1 Rich. 2, c. 10, passed in the next year (1377). The Act of 6 Rich. 2, c. 13 (1382), is stated to be: "The King's Pardon to his subjects after the late Insurrection;" and this was followed in the next year (1383), by the Act of 6 Rich. 2, st. 2, c. 1, which is stated to be: "A more large Pardon granted by the King to the offenders in the late Insurrection, with few exceptions." These acts reach back to a period nearly one hundred years before the invention of printing, and earlier than that from which the statutes of the realm are now extant in an unbroken series. Five acts of the same character appear from the Statutes at Large to have been passed in the reign of Richard II. (1377 to 1399); three in the reign of Henry IV. (1399 to 1413); one in the reign of Henry VIII. (1509 to 1547); three in the reign of Edward VI. (1547 to 1553); eleven in the forty-five years of the reign of Elizabeth (1558 to 1603), the first of which is the Act of 5 Eliz., c. 31, in 1563; and three in the reign of James I. (1603 to 1625).

The substance of the Act of 3 & 4 Edw. 6, c. 24, is stated to be "A confirmation by Parliament of the King's Pardon of all *Here-*

sies, Treasons, Rebellions, Murders, Felonies, Offences, Trespasses, &c., saving such which in the said Pardon be excepted." The restoration of Charles II. in 1660 was followed by an act of grace passed in the same year (12 Car. 2, c. 11), entitled "An Act of Free and General Pardon, Indemnity, and Oblivion," and another act of the same character was passed in 1673, in the same reign, (25 Car. 2, c. 5), entitled "An Act for the King's Majesties most Gracious, General, and Free Pardon." After the revolution in 1688, two such acts were passed in the reign of William and Mary, and of William III., viz.: one in 1690 (2 W. & M. sess. 1, c. 10), and one in 1694 (6 & 7 W. 3, c. 20). A similar act was passed in 1717 (3 Geo. 1, c. 19), on the occasion of the insurrection or rebellion in Scotland in favor of the Pretender in 1715; and a like act was passed in 1747 (20 Geo. 2, c. 52), on the occasion of the second and last insurrection or rebellion in Scotland, under the lead of the son of the Pretender in 1745,—these being the only occasions of insurrection or rebellion against the existing government in Great Britain, involving large masses and whole classes of the community, which have occurred since the revolution of 1688. Every one of these acts contains exceptions and conditions, sometimes affecting individuals by name, and sometimes affecting whole classes of the community,—as, from the benefit of each of the last two of these acts the entire clan of Macgregor in Scotland was excepted. The title of each of the last five of these acts is "An Act for the King's" (or "the King and Queen's") "most Gracious, General, and Free Pardon." The word *amnesty* does not appear in the operative words of any of them, and the nearest approach to the use of a word of equivalent meaning which is to be found in any of them is in the use of the word *oblivion*, a word which is used both in the title and operative words of the Act of 12 Car. 2, c. 11, but in no other act. The operative words of this act are, "that all and all manner of treasons, murders, felonies, offences, crimes," &c., \* \* counselled, commanded, acted, or done since," &c., \* \* "by any person or persons before," &c., \* \* "other than the persons hereafter by name excepted, in such manner as they are hereafter excepted," \* \* \* "be *pardoned, released, indemnified, discharged, and put in utter oblivion.*" The operative words of each of the other acts are precisely the same as those usually employed in the king's charter of pardon, viz.: —

\* \* “*be acquitted, pardoned, released, and discharged against the king's majesty, his heirs and successors, and every of them, of and from all and all manner of treasons, misprisions of treason, felonies, treasonable and seditious words or libels,*” &c., &c.

The object of each of these acts is “a general and free *pardon*,” and in every one of them this pardon is recognised as proceeding from the king in the exercise of his royal prerogative. The participation of Parliament in the act is merely in confirmation of the royal grace and favor, so as to make it more effectual and beneficial in the particulars which have already been mentioned than the king's charter of pardon (the benefits of which might be waived or lost through ignorance or negligence) could be; and it is in no sense in derogation or denial of the king's prerogative to grant a general pardon. The purification of blood corrupted by attainder could only be effected by an Act of Parliament, but not even an Act of Parliament could, *without express words*, effect this; and Acts of Parliament to reverse attainders cannot be considered as being in derogation of the king's prerogative of pardon, or even as being a necessary part of an act of general pardon. They may precede the pardon, or accompany it, or follow it, as was illustrated in the case of Lord Bolingbroke, who was attainted of treason in 1715 by Act of Parliament. Having fled from the realm, he was, in 1723, pardoned by the king, but the effect of this pardon was only to save his life, and did not enable him to resume and enjoy the family inheritance which was settled upon him without an Act of Parliament. In 1725, on his petition to the Parliament with the consent of the king, an act was passed relieving him from the execution of the act of attainder with respect to his forfeitures, so that he was enabled to resume and enjoy his family estates: Smollett's History of England, vol. i., pp. 520, 589, 594, Albany edit. of 1816. Acts reversing attainders have been frequently passed, and they may originate in either House of Parliament; and they are treated as ordinary bills, and not as an act of grace or general pardon proceeding from the king. In respect to the claim that “*amnesty is a larger power than pardon*,” it is difficult to conceive how amnesty, which by any recognised definition is no more than a grant of entire freedom from a penalty or the consequences of a crime, can be of any higher significance or effect than a full and complete pardon for the same crime, or how it can

differ from such a pardon in its nature, extent, effect, or application. The following extract from the observations of Lord Chief Justice HOLT, on the trial of *Andrew Rookwood* for high treason, in 1696 (13 State Trials, Howell's ed., p. 186), will show that the judgment of that great lawyer was in direct conflict with the argument and conclusions of the report of the Senate Judiciary Committee in relation to the extent and limits of the king's prerogative to grant pardons, viz:—

*Phipps*, for prisoner, "claimed that an Act of Parliament pardon removes those disabilities which the king's pardon does not; for every one is in law a party to an Act of Parliament, and therefore no person shall be permitted to allege in disability of another any crime which he himself hath pardoned, for that is to aver against his own act; but it is otherwise in the case of the king's pardon."

L. C. J. (HOLT).—"Why, the very parliamentary pardon comes from the king; the king has a full power of pardoning, and *where he does pardon under the Great Seal, it has the full effect of the Parliament pardon*. A pardon before attainder prevents all corruption of blood, so that though a man forfeits his goods by conviction, yet, after a pardon, he is capable of having new goods, and shall hold them without any forfeiture whatsoever; for the pardon restores him to his former capacity, and prevents any further forfeiture. Indeed, if he had been attainted, whereby his blood was corrupted, no pardon, whether it were by the king or by the Parliament, could purge his blood without reversal of the attainder, by writ of error, or Act of Parliament, or express words in the act to restore blood; but either pardon makes him a new creature, gives him new capacity, and makes him, to all intents and purposes, from the time of the pardon, to be *probus et legalis homo*, and a good witness."

It never was doubted that the exercise of the king's prerogative of pardon might be restrained or controlled by Act of Parliament, and several acts have been passed for this purpose. Thus the transporting and committing any man to prison without the realm is made by the Habeas Corpus Act, 31 Car. 2, c. 2, a crime unpardonable by the king; and by 12 & 13 W. 3, c. 2, it is declared that no pardon under the Great Seal shall be pleadable to an impeachment by the Commons in Parliament. By statute of 2 Edw. 3, c. 2, and 14 Edw. 3, c. 15, it is provided that no pardon of homicide shall be granted, but only where the king may do it *by the oath of his crown*; that is, where a man slayeth another in his own defence, or by misfortune; but the royal power in this respect is enlarged by the later statute of 13 Rich. 2, st. 2, c. 1, which provides that no pardon for treason, murder, or rape shall

be allowed unless the offence be particularly specified; and particularly in murder it shall be expressed whether it was committed by lying in wait, assault, or malice prepense. But no Act of Parliament was ever passed to restrain or limit the king's prerogative to grant a general pardon. Apart from the provisions of the statute last mentioned, requiring that in a pardon for treason, murder, or rape, the offence shall be particularly specified, the use of general words in the king's charter of pardon (such as a pardon of "*all felonies*," &c., without a particular specification or description of the felony intended to be pardoned) was always allowed by the courts only a very imperfect effect,—it being held that a pardon of "*all felonies*" would not pardon a conviction or attainder of felony (because it was to be presumed that the king knew not of those proceedings), but that the conviction or attainder must be particularly mentioned: 4 Bl. Com. 400. Hawkins (P. C., B. 2, c. 87, § 9) suggests this as one of the reasons why "general pardons are commonly made by Act of Parliament;" and he adds that such pardons "have been of late years very rarely granted by the Crown, without a particular description of the offence intended to be pardoned." This eminent writer on Crown law expresses no doubt of the existence of the power of the king to grant a general pardon, even while thus stating the reasons why such pardons are commonly made under and by Act of Parliament. The imperfect effect which general words in the king's charter of pardon may have, is an objection which is applicable merely to the *manner* in which the power of pardoning should be exercised; and it does not in anywise touch or draw in question the existence of the royal prerogative to grant a general pardon.

It is said in the report of the Senate Judiciary Committee that "the power of general pardon by proclamation did not exist, and was not claimed by any English sovereign, as the committee believe, after Great Britain had a constitution and a settled jurisprudence." The time when Great Britain first had a constitution and a settled jurisprudence may be regarded as not entirely definite. A reference to the English constitution would suggest *Magna Carta*; and England may be considered as having a constitution from the time when the great charter was granted by King John in 1215, or certainly from the time of the solemn confirmation of that charter by his son and successor Henry III. in 1253. Edward I., the son of Henry III., succeeded to the



crown on the death of his father in 1272. Sir MATTHEW HALE justly styles him the English Justinian, and says that more was done in the first thirteen years of his reign to settle and establish the distributive justice of the kingdom than in all the ages since that time put together: Hale's Hist. C. L. 158; 4 Bl. Com. 425. The result of the battle of Bosworth Field in 1485,—two hundred and seventy years after the grant of the great charter by King John, and more than two hundred years after the commencement of the reign of Edward I.,—terminated the usurpation of Richard II., and brought the Earl of Richmond to the throne, and he became king under the title of Henry VII. Among the published works of Lord BACON is a History of the Reign of King Henry VII., of which Lord BACON made a Latin translation for circulation on the continent. The works of Lord BACON have recently been edited in England with great care, learning, and ability by Messrs. Spedding, Ellis, and Heath, and this history is to be found in the 11th volume of the American republication of their edition of Lord BACON's Works (Boston, 1860-61). In this history, after describing the situation of public affairs at the time of the accession of Henry VII. to the Crown, Lord BACON says, vol. 11, p. 57: "The 7th of November" (1485) "the king held his Parliament at Westminster, which he had summoned immediately after his coming to London. His ends in calling a Parliament (and that so speedily) were three. \* \* The third to calm and quiet the fears of the rest of that party by a *general pardon*; not being ignorant in how great danger a king stands from his subjects, when most of his subjects are conscious in themselves that they stand in his danger." Upon these words,—"*a general pardon*,"—Mr. Spedding subjoins to the text the following note:

"This is explained in the (Latin) translation to mean such a pardon as was usual after a Parliament. *Ut inferioris conditionis homines qui Richardo adhæserent (ne forte novis motibus materiam præberet), remissionem generalem, qualis in fine comitiorum a rege emanare solet, consequerentur.* The nature of this general pardon is further explained in the *Index Vocabulorum* appended to the translation. It is defined *indulgentia Regis qua et crimina omnia (exceptis que in instrumento remissionis speciatim recensentur), et mulctæ, aliæque solutiones Regi debitæ abolentur.* And it is added that it may proceed either from the king alone or from the king and Parliament. *Illæ quandoque a Rege solo emanat, quandoque a Rege addita auctoritate Parliamenti.* It seems that Henry's first intention was to take the latter method, but that he changed his mind. See p. 62."

An act of attainder was passed at this Parliament against Richard II., and some of his leading adherents; and Lord Bacon, after stating this, proceeds (vol. 11, p. 62) as follows:—

“And for the pardon of the rest that had stood against the king (*i. e.*, those against whom no bill of attainder had been passed), the king upon a second advice thought it not fit it should pass by Parliament, the better (being matter of grace) to impropriate the thanks to himself: using only the opportunity of a Parliament time, the better to disperse it into the veins of the kingdom. Therefore during the Parliament he published his royal proclamation, offering pardon and grace of restitution to all such as had taken arms or been participant of any attempts against him, so as they submitted themselves to his mercy by a day, and took the oath of allegiance and fidelity to him, whereupon many came out of sanctuary, and many more came out of fear, no less guilty than those who had taken sanctuary.” (See also Hume's History of England, vol. ii., p. 202, Albany edn., 1816.)

Lord BACON, in describing the close of the reign of Henry VII., says (vol. 11, p. 354):—

“To crown also the last year of his reign (1508–9), as well as the first, he” (the king) “did an act of piety, rare and worthy to be taken in imitation. For he granted forth a general pardon, as expecting a second coronation in a better kingdom.”

It will be noticed from the instances already mentioned, that the power of general pardon under and by Act of Parliament was certainly exercised more than one hundred years before the commencement of the reign of Henry VII.; and so far was the exercise of the same power by the king's proclamation from being questioned as being in excess of his royal prerogative, or an infringement on the prerogative of Parliament, that in the reign of Henry VIII., the son and successor of Henry VII., it was enacted by Parliament (“to its eternal disgrace,” as Blackstone justly says,—Comm., vol. 4, p. 431), that the king's proclamations should have the force of Acts of Parliament—thus investing the king to the fullest extent with “the high and transcendent power” of Parliament, and making him, in fact, a constitutional autocrat and despot.

But English history furnishes other examples of the exercise of the power of general pardon by the king's proclamation, occurring more than two hundred years after Henry VII. succeeded to the crown, and at a time when it cannot be questioned that Eng-

land "had a constitution and a settled jurisprudence." Blackstone (4 Comm. 438), says that "the constitution of England had arrived to its full vigor, and the true balance between liberty and prerogative was happily established by *law*, in the reign of King Charles II." James II. succeeded Charles II. in February 1685. In the following summer the Duke of Monmouth, the eldest of the many illegitimate sons of Charles II., and a leader who was almost idolized by the populace, laid claim to the crown, alleging the legitimacy of his birth and that he was by right of blood King of England. He organized an extensive insurrection in the west of England, and was proclaimed king at Taunton, where, on his arrival, he was presented, by a train of twenty-six young girls, with an embroidered banner and a Bible. A bill of attainder for treason was passed against him by Parliament; and at Sedgemoor, on the 6th July, in "the last fight deserving the name of battle that has been fought on English ground," he was defeated, and his army was entirely routed. On the second day after, he was captured; and, seven days afterwards, he was executed on the scaffold at the Tower Hill, under the act of attainder. Then ensued the punishment of those who had been involved with him in the insurrection, and that series of military and legal atrocities by which Kirke and Jeffries literally made the west of England an Aceldama—the one being the incarnation of the most intense military, as the other was of the most intense judicial, brutality.

- It was the boast of Jeffries, after his return from the Western Assizes, in the autumn of that year, that he had hanged more traitors than all his predecessors together since the Conquest.
- An atonement having been made with blood to the satisfaction of the royal vengeance, the king, in the following spring (March 15th 1686), granted, by proclamation, a general pardon, with a few exceptions, to all those who had been implicated or engaged in the insurrection; but among the exceptions were the young girls of Taunton who presented the banner and the Bible to Monmouth: 1 Macaulay's History of England 442, note; Mackintosh's History of the Revolution in England in 1688, p. 32; Rapin's History of England, vol. 15 (8vo. ed.), p. 47. Well does Macaulay say (p. 441), that "the cruelty of James II. was not more odious than his mercy, or, rather, his mercy and his cruelty were such that each reflects infamy on the other."

The insurrection of Monmouth was followed, in a little more

than three years, by the events of the Revolution of 1688, which brought William and Mary to the throne. After the Prince of Orange landed in England, King James commenced a retraction of the worst of those fatal measures by which he had disaffected the whole kingdom, and he made various concessions for the ostensible purpose of regaining the affections of his people. Among these concessions were the calling of a Parliament, and the grant, by proclamation, of a free pardon to all who were in rebellion against him: Macaulay's History of England, vol. 2, pp. 354-356; but, whatever effect these concessions might otherwise have had, the folly and misconduct of the king was such that nothing which he yielded or promised could sensibly arrest or stay the progress of the Revolution. In the fourth year of his exile (1692), King James published a declaration to all his "loving subjects," renewing his claim to the crown, and announcing his intentions in respect to those who had assisted in overthrowing his authority and were instrumental in effecting the other results of the Revolution. In the following year (1693), he published another declaration, in which he promised, *inter alia*, that he would grant a free pardon to all his subjects who should not oppose him after he should land in England.

It was the object of the Declaration of Rights (1 W. & M., sess. 2, c. 2), one of the earliest Acts of Parliament in the Revolution, and the instrument by which William and Mary were called to the vacant throne, and which settled the order of succession to the crown, to set forth in the most distinct and solemn manner the fundamental principles of the English constitution. It was prepared by a committee of which Somers was chairman. As a constitutional lawyer, he was honored with the highest rank in his own age, and it may safely be said that no other age of English history has produced his superior.

In this Declaration of Rights is contained a recapitulation of the errors and crimes of King James which had made the Revolution necessary, and an assertion of the rights which had been by those errors and crimes violated. It complained of the assumption and exercise by the king of an illegal dispensing power, or the power of dispensing with or suspending the execution of penal laws, and especially of those laws which prevented Papists from filling offices in the state and the church,—of his levying taxes without grant of Parliament,—of his maintaining a standing

army in time of peace without consent of Parliament,—and of many other breaches of the royal prerogatives; but it contains no word of censure, nor even an allusion in respect to his exercise of the power to grant a general pardon by proclamation. No intimation is made by any lawyer, statesman, or historian of the time, or by any writer on English constitutional history, “as it is believed,” that in exercising this power King James exceeded the limits of the royal prerogative. On the contrary, Macaulay (vol. iv., p. 170, vol. ii., p. 386), in referring to the declaration of King James in 1692, censures it in that while it denounced vengeance against large classes of people, it did not offer a general amnesty to the rest. Why should King James offer a general amnesty if he had no lawful power to grant it, or if, without the consent of Parliament, he could not make it effectual?

There is no instance in which the exercise by the king of the power to grant a general pardon by proclamation was ever made the subject of complaint, censure, or question by Parliament; and it is very clear from the cases which have been referred to that the power to grant a general pardon or amnesty has uniformly been treated in England as being included within the royal prerogative of pardon, even when exercised under and by Acts of Parliament. In other words, the power to grant pardon in England has uniformly been treated as being a generic power, while an act of amnesty is merely one of the forms in which that power is exercised; and, so far is an act of amnesty from being “a widely different thing” from a pardon, that the essential and distinguishing feature of every act of amnesty is the fact of pardon. The whole matter may be summed up in the declaration of Lord BACON, before referred to, that “a general pardon may proceed either from the king alone, or from the king with the authority of Parliament in addition,” with the declaration of Lord HOLT in *Rookwood's Case*, *ubi supra*, that when the king grants a pardon under the great seal, “it has the full effect of the Parliament pardon.”

L. C. K.

(To be continued.)

## RECENT AMERICAN DECISIONS.

*Superior Court, Eastern District of Georgia.*STATE OF GEORGIA *vs* RELATIONE JAMES J. WARING *v.*  
THE GEORGIA MEDICAL SOCIETY.<sup>1</sup>

Membership of a club which is purely literary or social or scientific, and does not own property, cannot be considered a right of property; nor is the right of meeting the other members a vested right of which courts can take cognisance.

*Mandamus* is not the proper form of remedy for a member of such a club who is expelled.

THE relator filed his petition in the Superior Court of Chatham county, alleging that the respondent, The Georgia Medical Society, had deprived him of his privileges as a member of that body, by an attempt at his expulsion, for causes which he alleged to be insufficient in law, and in a manner not in accordance with law.

The facts appeared to be that the relator being a member of the defendant society was charged substantially, 1. With having "forfeited his position as a gentleman of respectable social standing," in that he had become surety on the bond of one White, a person of color, elected clerk of the court in opposition to the wishes of the entire respectable community, and then under indictment for larceny, thereby facilitating the qualification for office of a disreputable person, and also in that he had become surety on the bonds of various persons of color charged with riot, thus upholding persons of dangerous character; 2dly. With having "conducted himself in such manner as would render him ineligible to membership," setting forth the same acts as above charged, with others of which he was found guilty.

The constitution of the society provided that "the resident members of this society shall be composed of regular graduates of medicine, and shall be gentlemen of respectable social position."

A by-law of the society also provided that:—

"Any member who shall be guilty of ungentlemanly conduct during the session of the society, or who shall conduct himself, out of the society, in such a manner as would render him ineligible to membership, shall be expelled from the society according to the wishes of two-thirds of the members of the society present: *Provided*, that in every instance specific charges

<sup>1</sup> We are indebted for this case to John H. Thomas, Esq., of Savannah.—EDS.  
AM. L. R.

be set forth and handed to the individual at least one month before the society take action thereon."

Notice of the foregoing charges was duly given to relator, and at a subsequent meeting of the society he was tried and adjudged guilty, the relator objecting to the proceedings as against law. A vote was then taken to expel relator but was defeated, and a resolution passed that he be censured by the president. The relator, on being requested, came to the meeting, and the president was proceeding to censure him when he arose and objected and then left the room, but returned in a few minutes and stated that he would receive the censure. A resolution was then passed requesting him to resign, which he declined to do. At a regular meeting of the society on October 14th 1868, a resolution was passed reciting the principal facts, and also that the relator had at two previous meetings behaved discourteously to the society, and in such a manner as would render him ineligible to membership, and that at the next regular meeting in November the society would vote upon expelling him. Of this the relator had due notice one month previous to the November meeting, and at this meeting he was expelled by a vote of two-thirds of the members present. The relator was not present at this meeting but made a written communication stating that he was unable to attend by reason of severe indisposition, disclaiming any intentional discourtesy to the society, and protesting against any proceedings on the resolution sent to him, as unlawful and unjust.

*Hartridge and Chisholm*, for relator, cited the following authorities: 1 Black. Com. 471, 476, 481; 2 Johns. Chan. R. 335; 6 Conn. 544; 4 Wheat. 657, 674, 699; 20 Pick. 495; 1 S. & R. 254; 2 Id. 141; 6 Conn. 532; 5 Watts 152; 10 Wend. 293; 1 Cowen 423; 12 John. 414; 2 Binney 448; 1 Strange 1051; 1 Cranch 168; 2 Esp. N. P. 682; 2 Burr. 723, 731, 738, 1045; 3 Id. 1265, 1267; 4 Id. 2186; 1 Id. 538; 2 L. Raym. 1564; 4 Geo. 44, 117; 2 Esp. N. P. 317-8; 2 Esp. R. 677; 1 Strange 557; 6 S. & R. 469; 4 Bac. Ab. 507; 12 Geo. 178; 26 Id. 665, 676; 2 Esp. N. P. 677, n. 3; Const. of Georgia, §§ 3, 9, 10; 10 Mod. 76; Cowp. 503; 2 Burr. 731; 6 S. & R. 476; Angel & Ames on Corp., chap. xii., §§ 408, 409; 2 Kent's Com. 298; 1 Sumner 301; 2 Term R. 181; 4 Bac. Ab. 500; 2 Selw. N. P. 1083, n.; 2 Black. Com. 21, 37; 3 Term R. 651;

3 East 188; 31 Geo. 206; 8 Term R. 352; 1 Black. Com. 44-60; 1 Bish. Crim. Law, §§ 55, 58, 114; Eden on Pen. Laws 309; Tapp. on Man. 119, 201, 358, 374, 392-4; Angel & A. on Corp. 597, 683, 711; T. U. P. Charl. (Ga.) 235; Graht on Corp.; Willcock on Mun. Corp. 150; Code of Georgia, §§ 1679, 3142, 4227, 712; 2 Barn. & Ald. 620; 5 Id. 899.

*Thos. E. Lloyd, and Jackson, Lawton & Basinger*, for respondent, cited the following authorities: Code of Georgia, § 1416-1424; 14 Geo. 388, 9; Ang. & Ames on Corp. 3, 602; 7 Eng. Com. L. 295; 1 Sumner 284, 299; Code of Georgia, §§ 1671-2, 3, 3143-4; Ang. & Am. on Corp. 615; 26 Geo. 675; 1 Keb. 84; Carthew 92; 2 Shower 191; Tapp. on Man. 69, 70, 145-6; 2 Black. Com. 266; 2 Term R. 352-6; 2 Kent's Com. 294; Black. Com. 471; 1 Kent's Com. 297; 3 Wend. 476; 2 Binney 148; 5 Burr. 2761; 1 Black. 25-58; 23 Eng. Com. L. 66, 71; Code of Georgia, § 3706; 7 East 353; 36 Geo. 461; 1 Sumner 284, 299; 2 Kent's Com. 304; 2 Term R. 182, 356; Ang. & Am. on Corp. 602; 2 Term R. 177; 2 Cowp. 523; 7 Eng. Com. L. 245; Code of Georgia, § 3145; 1 Mod. 82; 4 Burr. 2186; Tapp. on Man. 137, 138, 216; 7 Term R. 391; 4 Geo. 26; Code of Georgia, § 3142.

SCHLEY, J.—This cause came on to be heard, and after elaborate argument the court is called upon to decide the legal points made, which are to control ultimately this case; and after analyzing its merits, I have resolved it into two questions.

The *first* is, had or has Dr. James J. Waring any vested rights as a member of The Georgia Medical Society? And, *second*, if he had or has, is *mandamus* the proper remedy for the enforcement of his rights?

The only rights which the relator can have, as a member of the society, are either, *first*, a right to property; *second*, a right to membership, with a view to the improvement of the science of medicine; *third*, a right to practice his profession and collect his fees; or, *fourth*, a right to meet the members of said society on social equality.

In reference to the first right, to wit, the right to property, it may be well to look to the charter to ascertain what the object of this society is. It is clearly not to acquire property. No right



is given to the society by the charter to buy or sell. It can only receive bequests or donations. And even these it cannot take for any individual benefit, but only for the promotion of the purposes of the society. And what are they? The lessening of fatality and the improvement of the science of medicine. Can any physician purchase any right in or to the society? Can he sell any right he as a member of the society may have? Can he convey to another his right by will or deed? Or, if he die, will his rights descend or go to his legal or personal representatives? Clearly not. If, then, no member has any right which he can buy or sell, or bequeath or transmit, can his right in any sense be said to be property? I think not.

If, then, the relator had no property in the sense referred to, let us turn to the *second* supposed right and see if it can be a vested right, to wit:—the right to improve the science of medicine. This is one of the objects of the society, and it may be said that membership is necessary to its accomplishment. But it is only necessary to ask the question, can this, in any possible sense, be a vested right, to have the response in the negative. The relator's right to accomplish that benevolent end can neither be increased nor diminished in or out of the society. This question, it seems to me, will not bear discussion.

But, *thirdly*, has the relator's right to charge or collect fees as a practitioner been taken away by his expulsion from the society? He neither acquired this right in entering the society, nor lost it on his expulsion. He had it before, and he has it now unimpaired.

*Fourthly*. Was the relator's right to meet the other members of the society in social intercourse, or even in professional intercourse, a vested right? It is true that while a member of the society he had the right to enter the society, to join in the deliberations of that body, and to do all acts incidental to its object and designs, but can this, in any sense, be called a vested right? A member of the Georgia Historical Society, for instance, so long as he deports himself in compliance with the rules established for its government and purposes, has the right to meet that body and take part in its deliberations, but it will hardly be suggested that such a right is so vested in him, as that he cannot forfeit it short of the commission of a crime. Each of these societies is eminently of a social nature; and social standing, good character,

respect of its members, harmony of action, and brotherly kindness, are essential to the accomplishment of the objects of both; and it seems just as reasonable and right that each should be vested with the power to rid itself of an objectionable member, as that either should have the right to prevent a disreputable character from acquiring membership.

But suppose the relator has a vested right in either of the four ways suggested (and I can conceive of no other possible right he or any member of this society can have), can all or any of such rights be enforced by the *writ of mandamus*? If he has a vested right in property, he can enforce that by a common-law process. His interest, if property, is ascertainable and can be recovered. But can the *writ of mandamus* compel the members of the Georgia Medical Society to return any or all of the other three supposed rights? I think not. We have already seen that the relator's right to practice his profession and collect his fees exists independent of his connection with the Georgia Medical Society; and it is not necessary, therefore, to discuss that question. But as to the *third* and *fourth* possible rights, it is to be observed that they, in my judgment, are not within the scope of the operation of the *writ of mandamus*. They are eminently and exclusively social, not to say ethical, or if you please æsthetical questions. The court might order The Georgia Medical Society to receive the relator into free membership, and yet as to these two rights of membership, to wit, social meeting and promoting the benevolent objects of the society, the court has no power to enforce its mandate. Suppose the members of the society refuse to *meet* with the relator, refuse to *discuss* medical science with him, refuse to consult with him, refuse to exert any effort, physical or mental, to carry out the purposes of the society, what power of compulsion has this court which it can bring to bear on such recusant members? The bare question shows its impracticability.

I must, therefore, refuse the *mandamus*.

The result arrived at in the foregoing case appears, so far as we gather from the facts reported, to be substantially correct, but the decision can hardly be supported on the reasoning of the opinion.

No case that we have seen has gone so far, as to say that rights of member-

ship, even in a merely literary or social club, are not vested rights which the law will protect, and many cases have laid down with great stringency, rules which must govern the exercise of even the most unlimited discretion as to expulsion of members from societies.

The early English decisions, beginning with the famous case of *James Bagg*, reported by Lord COKE, 11 Rep. 93, were cases of amotion or disfranchisement in public or municipal corporations. In *Bagg's Case*, it was resolved by the Court of King's Bench that the power of disfranchisement could only be exercised under authority given by express words in the charter, or by prescription; and where no such express authority existed, there must be a conviction of some offence in a court of law before the offender could be disfranchised.

As corporations however grew more numerous, and their character and purposes essentially changed, it was found that this limitation of power was too narrow to meet the cases then arising, and in what may be called the second leading case on the subject, *Rex v. Richardson*, 1 Burr. 517, it was decided that a corporation may make a by-law giving power of amotion for just cause, though the corporation that made it had no power of amotion expressly given by charter or claimed by prescription. Lord MANSFIELD in delivering judgment said: "There are three sorts of offences for which an officer or corporator may be discharged:—

"1. Such as have *no immediate relation to his office*, but are themselves of so *infamous* a nature as to render the offender unfit to execute any public franchise.

"2. Such as are only against his oath and the *duty of his office as a corporator*; and amount to breaches of the tacit condition annexed to his franchise or office.

"3. Offences of a mixed nature—as being an offence not only against the duty of his office, but also a matter indictable at the common law." The power of amotion, therefore, he said, was *incident to every corporation*, though the manner in which it should be exer-

cised might differ according to the distinction made in offences. For the first class of offences a corporator can only be removed after *conviction in a court of law*; but for the second sort, the power of trial as well as removal is incident to every corporation.

The reasoning and authority of Lord MANSFIELD, in *Rex v. Richardson*, have been followed with great uniformity in subsequent cases both in England and America, though the courts have shown a strong tendency to restrict the exercise of the power of expulsion for causes of the second class to cases of acts directly and unequivocally against the very purpose and existence of the corporation. The leading American case is *Commonwealth v. President of St. Patrick Benevolent Society*, 2 Binn. 441 (1810). The society was a charitable corporation, for the purpose of raising funds to assist its members in sickness, &c. By the charter it was authorized to make rules and by-laws, and to do everything needful for the good government and support of the corporation. A by-law enacted, that "vilifying any of its members" should be a crime against the society, and might be punished by expulsion. The relator was expelled for this offence. The proceedings were regular, and the case turned on the validity of the by-law. The court, by TILGHMAN, C. J., held the by-law void, on the ground that private quarrels of members were totally unconnected with the purposes of the society, and such a by-law therefore was not necessary for its good government and support, and awarded a peremptory mandamus to restore the relator.

It is very clear that the character of an act considered as an offence of the second class enumerated by Lord MANSFIELD, depends materially on the nature and purpose of the corporation itself. Money corporations properly so called, that is corporations whose primary object

is the acquisition of property or profit for its members, stand on a very different basis from those in which profit to individual members has no part, and in which acquisition of property in the corporation itself is merely incidental to its real purposes and objects. In the former, it is conceded that the power of expulsion can only be exercised under express authority derived from the charter: *Angell & Ames on Corp.* §§ 113, 410. But even in the latter class, the courts have uniformly treated membership as a vested right which they would protect from illegal or irregular interference. Thus, in *Fuller v. Trustees of Plainfield Academy*, 6 Conn. 532, it was held that the place of a trustee in an eleemosynary corporation, though no emoluments are attached to it, is yet a franchise of such nature that a person improperly dispossessed of it is entitled to redress, and a peremptory mandamus was awarded. So in *People ex rel. Gray v. Medical Society of Erie*, 24 Barb. 570. The medical society established a fee-bill, and provided by a by-law that any member taking a smaller fee than the one prescribed in the fee-bill might be expelled. The society had by statute the right to make by-laws regulating the admission and *expulsion* of members. The relator was expelled by the society for violation of the fee-bill, and on mandamus the court ordered him restored, on the ground that the by-law was not one within the proper powers of the society.

To the same effect are the numerous cases cited by the counsel for the relator in the principal case, and also *Evans v. The Philadelphia Club*, 14 Wright (50 Penn.) 107, a very interesting case, which was argued with great earnestness by very able counsel on both sides. The decision being unfortunately by a divided court, with no reasons assigned, has not the authority to which it would otherwise be entitled.

The course of reasoning, therefore, by which the learned judge in the principal case refines away the rights of the relator, cannot be considered as supported by authority, nor can the denial of the remedy by *mandamus*. It was decided by Lord MANSFIELD in *Rex v. Barker*, 3 Burr. 1265, that *mandamus* is the proper remedy, and this has been uniformly followed both in England and America.

The result of the adjudicated cases on the subject of amotion and disfranchisement, would seem to reduce the power of expulsion within very narrow limits. Social clubs, however, being of very recent origin, and scientific or literary societies having a social basis and character having of late grown into importance, it must be expected that the cases arising hereafter in reference to such societies cannot be fairly brought within the stringent rules in regard to expulsion of members, which have been found just and satisfactory hitherto. As the change in times and manners from Lord COKE to Lord MANSFIELD led the King's Bench to the distinctions taken between *Bagg's Case* and *Rex v. Richardson*, so the changes of the last century must bring the courts to a more liberal application of the principles of the latter case.

The true and solid ground on which to decide such cases is, as it seems to us, the contract of membership, liberally construed with reference to the purposes of the corporation or society. The classification of Lord MANSFIELD is sufficiently comprehensive. "Secondly," he says, "such as are against the duty of his office as a corporator; and amount to *breaches of the tacit condition annexed to his franchise*." Whether an act be such a breach or not should be judged entirely by its effect on the society; and if by his assent to the laws and rules of the society, a member has agreed that the corporation, or any part of it, shall be the tribunal to decide the

fact, then the courts instead of being astute to discover defects of jurisdiction (as it must be confessed they have in many of the American cases), should aim liberally to support the judgment of the tribunal agreed upon.

In the latest English case on this subject, *Hopkinson v. Marquis of Exeter*, Law Rep. 5 Eq. 63, the complainant being a member of the *Conservative Club*, had given pledge that he would vote for certain liberal candidates at the parliamentary election, and for this he was expelled from the club. The rules of the club made no reference to the political opinions of its members, except so far as they were implied from its name. Lord ROMILLY, M. R., refused to restore the complainant, on the ground that he had submitted to the jurisdiction of the club by becoming a member, and the proceedings had been regular according to the by-laws. A club, he said, was a partnership, but of a different kind from any other; and the members had by rules constituted a tribunal for the decision of questions of membership and expulsion. "The question is, whether there is any appeal from that decision.

It is clear that every member has contracted to abide by that rule which gives an absolute discretion to two-thirds of the members present to expel any member. Such discretion, like that referred to by Lord ELDON in *White v. Damon*, 7 Ves. 35, must not be a capricious or arbitrary discretion. But if the decision has been arrived at *bonâ fide*, without any caprice or improper motive, then it is a judicial opinion from which there is no appeal."

It does not appear from the report whether the club was incorporated or not; but, putting the decision fairly on the contract of the member to abide by the judgment of the tribunal established by the by-laws, we are unable to perceive that the fact of incorporation is at all material.

If the decision in the principal case had been rested on the by-law quoted, and the regularity of proceedings under it, we think it would have stood on a basis of sound reason, and have been strictly within the *principle* of Lord MANSFIELD's judgment in *Rex v. Richardson*.  
J. T. M.

### *Court of Appeals of Maryland.*

#### NORTHERN CENTRAL RAILWAY CO. v. CANTON CO.<sup>1</sup>

Trade fixtures and buildings for trade, no matter how strongly attached to the soil or firmly embedded in it, are treated as personal property, and as such subject to removal by the person erecting them.

The road-bed of a railway, the rails fastened to it, and the buildings at the depots are real property; but under certain circumstances they may be trade fixtures, and be treated as personal property.

The ground upon which a tenant's right to remove his fixtures has been limited during the continuance of his term, rests upon the doctrine, that if he neglected to avail himself of his right within this period, the law presumed that he voluntarily

<sup>1</sup> We are indebted for the opinion in this case to the Baltimore Law Transcript.—EDS. AM. L. R.

relinquished his claim in favor of the landlord. This presumption cannot arise, where the term, being uncertain in its continuance, may be terminated suddenly, and without previous notice.

THE Northern Central Railway Company, after the year 1855, and before 1859, constructed, at its sole cost and charge, a railway track upon the lands of the Canton Company, with the license and permission of the latter. In 1859 the appellee revoked the license under which the appellant was in possession of its land. This was followed, in 1860, by two suits, one an action of ejectment, and the other of trespass *quare clausum fregit*. During the pendency of these suits, which had been referred, by agreement, to an arbitrator, the appellant filed a bill for specific performance, and also praying for an injunction. The appellee was successful in having the bill dismissed, and recovered judgment in both actions at law. A subsequent action of ejectment was brought in January 1865, for the road bed, which had not been embraced in the previous ejectment suit. A judgment thereon was obtained in June following, and under a writ of *habere facias* possession was delivered to the appellee in October of the same year. The rails and other materials which formed a part of the railway constructed by the appellant under the circumstances above stated, were upon the land at the time, and the question arises who is the rightful owner of them.

The opinion of the court was delivered by

BRENT, J.—The fact that the rails had been taken up and severed from the soil shortly before the execution of the writ of possession is immaterial. If the appellant had no title to them while attached as a railway to the soil, the severance did not confer any.

The general rule of the common law certainly is, that whatever is fixed and annexed to the soil, becomes a part of it, and cannot be removed except by him who is entitled to the inheritance. But this rule is by no means inflexible and without exception. Trade fixtures have been held by the earliest cases, in which the question arose, to form an exception, no matter how strongly attached to the soil or firmly embedded in it, they are treated as personal property, and as such subject to removal by the person erecting them. In the leading case of *Elwes v. Mawe*, 3 East 38, 2 Smith's L. C. 251, the earlier and more important decisions upon this subject

are very fully reviewed by Lord ELLENBOROUGH, and his conclusion from them, that trade fixtures and buildings for trade have always been recognised as an allowed exception to the general rule, has been acquiesced in, without an exception, as correctly stating the law. The distinction which he makes against fixtures for agricultural purposes has been doubted, and regarded as too nice and technical, but there is no case in which the exception has not been held to apply to trade fixtures. In *Van Ness v. Pacard*, 2 Peters 137, the exception is recognised by the Supreme Court of the United States, STORY, J., delivering the opinion, and the doctrine applied to a house, which had been erected as an accessory to the business of a dairyman, although it was occupied as the residence of his family, and those employed by him. It is also recognised and asserted in *Holmes v. Tremper*, 20 John. R. 29; *White's Appeal*, 10 Barr 252, and authorities there cited.

Another exception to the general rule is that of structures upon the land of another, which have been erected by the builder at his own cost and for his own exclusive use as disconnected with the use of the land. If so erected with the knowledge and assent of the owner of the land, the title remains in the builder, and the property is held by him as a personal chattel. Thus it is not so much the character of the structure as the circumstances under which it was erected, that will determine whether it passes with the realty, or is to be treated as personal property. In the notes to the cases of *Prince v. Case*, and *Rerick v. Kern*, 2 Amer. L. C. 747, it is correctly said the American courts "have repeatedly held that a house or other building will not be merged in the land on which it stands in consequence of the solidity of its structure, or the connection between it and its foundations; if the agreement of the parties, and the purposes of justice require, that the title to both should be kept separate, and that the owner of the house should have the right to enter for the purpose of using it as his own, or removing it." In the case of *Dame v. Dame*, 38 N. H. 429, this doctrine was applied to a house erected upon the land of another, and it was held to be but a personal chattel. It is also established by *Curtiss v. Hoyt*, 19 Conn. Rep. 154; *Wells v. Banister*, 4 Mass. 514; *Barnes v. Barnes*, 6 Verm. 388; *Pemberton v. King*, 2 Devereux 376, and being personalty, it is governed by the same rules as any other personal property left by the consent of the owner of other land upon his premises: *Smith v. Benson*,

1 Hill 176. We consider the property in dispute in this case, as coming within both of these exceptions. The railway of which it formed an important and necessary part, cannot rationally be supposed to have been designed for any other purpose than that of trade connected with the ordinary business and pursuits of a railway company. It certainly was not accessory to the enjoyment of the freehold, or in any manner necessary and convenient for the occupation of the land by the party entitled to the inheritance. Had it been voluntarily abandoned, it is not pretended that it would, or could have been used by the appellee as a railway. The conclusion cannot be avoided, that it was built by the appellant with a view and for the purpose of facilitating and increasing the business and trade in which the corporators, under their corporate powers, had embarked as carriers. A railway is certainly quite as essential to the trade and business of a railway company as a steam-engine and the house which may cover it, or any other fixture can be to the miller or the miner. We do not mean to be understood as denying the doctrine laid down in *The Farmers' Loan and Trust Co. v. Hendrickson*, 25 Barb. 484, and cited with approval in 18 Md. 193, that the road-bed of a railway, the rails fastened to it, and the buildings at the depots are real property; *prima facie* a house, with its foundation planted in the soil, is real property; yet when it is accessory to trade and in law a trade fixture, we find all the authorities regard it as personal property. The same doctrine is applicable to the railway in question. As a general rule, it would be regarded as real property, but under the circumstances of this case, coming as it does within the definition of a trade fixture, it becomes personalty, liable to the same rules of law that govern any other personal property.

All the surrounding circumstances show that at the time this railway was laid upon the land of the appellee, it was not intended that it should be merged in the freehold. It was built at the sole cost of the appellant, with its money and labor, under the reasonable belief that it had a free right of way, and under the license and by the permission of the owner of the soil. It is true this license was not of such a character as made it irrevocable, or gave the appellant any sufficient standing in a court of equity, to obtain a decree for a specific performance, yet it was a license justifying an entry, and whatever was done under it, before its revocation, is to be regarded as legal, and not as the act of a trespasser. The



road thus laid must have been intended by both parties for the exclusive use of the railway company, and that use could not have been fully enjoyed without the right to hold and control it. The appellant could not otherwise have directed its management, and taken up and replaced such rails or other materials as were necessary in its judgment for the repairs and proper condition of the road.

The strict rule, which has been applied to tenants requiring them to remove fixtures which they hold as personal property, during the term, even if it was adopted by this court, does not apply to the present case. The ground upon which a tenant's right to remove his fixtures has been limited during the continuance of his term, rests upon the doctrine that if he neglected to avail himself of his right within this period, the law presumed that he voluntarily relinquished his claim in favor of the landlord. This presumption cannot arise where the term, being uncertain in its continuance, may be terminated suddenly, and without previous notice. To apply it to a party in possession under a license revocable at pleasure, would be manifestly unjust and without reason. It would be allowing a party, without any fault of his own, or any opportunity of removal, to be deprived of his property at the mere will and caprice of another.

If the property replevied did not belong to the appellee at the time the license to the appellant to be upon its land was revoked, it is not perceived how the subsequent suits between them could have changed the title to it. This property was not the subject of those suits. They had reference to the land only upon which it was, and determined no question of its ownership, inasmuch as it does not pass with the realty from the single circumstance of having been affixed to the soil.

Upon a careful review of the law and facts in this case, we cannot agree with the court below. We think the property in question belonged to the appellant, and the judgment below should be reversed.

Judgment reversed, and judgment for the appellant for the property replevied, and one cent damages and costs.

The foregoing decision affords another instance of the ingenious but rather disingenuous devices of courts, in making compensation for their own errors. The true and manly course, unquestionably, would have been to hold the license to

use the land for railway purposes, after it had been executed by laying a track, as irrevocable, on the same grounds that oral contracts for the sale of land have been enforced in courts of equity. But there has been a great deal of ingenious refinement to escape from any such sensible and natural course. And the latest one is, that while any one who stands by and allows another to build upon his own land, to the obstruction of any incorporeal right of the person thus acquiescing, he will be precluded from thereafter interposing any obstacle to the use and continuance of such obstruction; that no such consequence follows even an express license to build on the land of another by the owner: *Dyer v. Sanford*, 9 Met. 395, and cases cited.

We know there is a great deal of learning expended to show the distinction between allowing such license to operate upon corporeal and incorporeal interests in land, and how the one is more in conflict with the Statute of Frauds than the other. But the truth is, that both are in direct conflict with that statute, and so is a decree of specific performance on the ground of part-performance. But if fraud will justify a court of equity in denying the perpetrator the shield of an express statute in one case, it certainly will in all cases. And the refusal to extend it to all analogous cases, as is done in making this distinction between licenses executed upon the land of the licensor and that of the licensee, is without any just

foundation, or ground to stand upon. And the same rule has been extended to a license executed on the land of a third party, which was held irrevocable: *Curtis v. Noonan*, 10 Allen 406. The distinction is here made between *acquiring* and *abandoning* an easement in land; that the one cannot be done by oral license, but the other may be. But the distinction is rather thin and shadowy. An existing easement in land can only be regarded as an interest in the realty, and of equal importance only with one of equal extent to be thereafter created. The former cannot be abandoned by the owner without passing to some other, not perhaps as a distinct easement, but as an interest in the land. The absolute owner of land is no more affected in his title by the creation of an easement in the land, than he is by the destruction of the same easement thereafter; so that it is allowing ourselves to be cheated by a very thin disguise to affect to believe, that the creation of an easement in land by parol, is any more in conflict with the Statute of Frauds than its abandonment.

And the calling a railway a temporary fixture for the purposes of trade, is better than no redress in so palpable a wrong as the present case presents; but, after all, it is curing one blunder by another scarcely less flagrant. But we admit it is better than no remedy. We would go back and find where the train first left the track, and there apply the cure.

I. F. R.

*Supreme Court of Iowa.*

## HAWLEY v. HUNT.

State insolvent laws have no extra-territorial operation : and a creditor cannot be compelled by a state of which he is not a citizen or resident to become a party to insolvent proceedings therein ; and such proceedings cannot discharge a debt due to a non-resident creditor, unless he voluntarily submits to the jurisdiction by becoming a party to the proceedings, or claiming a dividend thereunder.

A non-resident and non-assenting creditor is not bound by a debtor's discharge under state insolvent laws, no matter where the debt originated, or is made payable : *citizenship* of the parties governs, and not the *place* where the contract was made or where it is to be performed.

This rule applies to a case where a non-resident creditor has recovered judgment against his debtor in the state where the latter resides ; and also to the case where the judgment has been assigned to a non-resident creditor and notice given to the debtor, before the latter commenced proceedings to obtain his discharge.

The history of the Federal and state adjudications on the subject of the effect of discharges under state insolvent laws, examined by DILLON, C. J.

## APPEAL from Jackson District Court.

The plaintiff sued on two judgments rendered against the defendant in New York. The defence relied on was a discharge of the defendant under the insolvent law of that state.

In 1854, two judgments were rendered against the defendant in the Supreme Court of New York. The defendant was at that time a resident and citizen of that state. Those judgments (as would appear from copies of the complaints), were rendered upon promissory notes executed by the defendant respectively to one Pierce (who assigned the note to one Rulsion), and to one Thomas. Where the notes were executed did not otherwise appear than by averment in the complaints in the actions in New York, that one of the notes was executed at "Denmark," and the other at "Gouverneur," but in what state was not alleged. Of what state Rulsion and Thomas, who recovered the judgments in New York against the defendant, were citizens, did not appear.

In 1856, the defendant removed from New York and became a resident of Iowa, and was a resident of Iowa at the time of the commencement of the present action, and at the time the judgment therein was rendered in his favor, from which the plaintiff prosecutes the present appeal. In 1860, one of the judgments obtained in New York against the defendant was assigned by the

judgment-plaintiff to Hawley, the plaintiff in the present action, *then and now a resident and citizen of Iowa.*

In 1861, the other judgment was likewise assigned to Hawley.

In 1862, Hawley commenced the present action on the above-mentioned judgments against the defendant in the District Court of Jackson county, Iowa (defendant being a resident of that county), and obtained personal service of process upon him. Defendant appeared, and in March 1862, filed an answer, admitting the rendition of judgment against him in New York as alleged, and pleaded payment, &c. The cause was continued from time to time, until, in March 1865, an amended answer was filed, in which the defendant alleged that "on the 3d day of August 1863, he was duly discharged from all his debts under the statute of the state of New York, providing for the discharge of insolvents." A copy of the discharge was annexed to the answer. The certificate of discharge was dated on the 3d day of August 1863, and the officer, after reciting the proceedings, declares that "he does hereby discharge the said insolvent from all his debts and from imprisonment, pursuant to the provisions of the statute."

The foregoing facts were uncontroverted. On the trial the plaintiff maintained that the defendant was not a resident of New York at the time he applied for and obtained a discharge under the insolvent law of that state. This the defendant denied, and on this issue both parties introduced evidence.

A jury was waived and the cause tried by the court, which gave judgment for the defendant. The plaintiff appealed.

*C. M. Dunbar*, for appellant.

*W. E. Leffingwell*, for appellee.

The opinion of the court was delivered by

DILLON, C. J.—Respecting the validity of discharges under state insolvent laws, where the creditor is a non-resident of the state granting the discharge, there has been much discussion, much conflict of view, and, until quite recently, on some points much doubt.

But in view of the authoritative adjudications of the Supreme Court of the United States, presently to be referred to, and of the leading decisions of the state courts, cited below, the law, so

far as relates to the present case, may be stated in a single sentence.

The settled doctrine now is, that a debt attends the person of the creditor, no matter in what state the debt originated or is made payable; that a creditor cannot be compelled by a state of which he is not a citizen or resident, to become a party to insolvent proceedings therein; that such proceedings are judicial in their nature, so that jurisdiction over the person of the creditor is essential; that notice is requisite to jurisdiction in such cases, and can no more be given in insolvent proceedings than in personal actions where the party to be notified resides out of the state, and hence a discharge under a state insolvent law will not and cannot discharge a debt due to a citizen of another state, unless the latter appears and voluntarily submits to the jurisdiction of the court by becoming a party to the proceeding, or claiming a dividend thereunder.

As direct authority for this statement of the law, we refer to the following decisions of the Supreme Court of the United States: *Baldwin v. Hale*, 1 Wallace 223, 1863; s. c. 3 Am. Law Reg. (N. S.) 462, and note by Judge REDFIELD; *Ogden v. Saunders*, 12 Wheat. 213; *Boyle v. Zacharie*, 6 Pet. 348; *Cook v. Moffat*, 5 How. 310; *Suydam et al. v. Broadnax*, 14 Pet. 75.

See also the following cases and authorities: *Donnelly v. Corbett*, 7 N. Y. (3 Seld.) 500; *Felch v. Bugbee*, 48 Maine 9; s. c. 9 Am. Law Reg. (O. S.) 104; *Beers v. Rhea*, 5 Texas 349; *Poe v. Duck*, 5 Md. 1; *Anderson v. Wheeler*, 25 Conn. 603; *Crow v. Coons*, 27 Mo. 512; *Pugh v. Bussel*, 2 Blackf. 394; *Beer v. Hooper*, 32 Miss. 246; *Woodhull v. Wagner*, Baldw. C. C. Rep. 300; *Byrd v. Badger*, 1 McAll. 263; *Springer v. Foster*, 2 Story 387; 2 Story Const., § 1390; Conf. Laws, § 341; 2 Kent Com. (9 ed.) 503; *Kelly v. Drury*, 9 Allen 27, 1864.

I have said that the settled law now is, that a non-resident and non-assenting creditor is not bound by the debtor's discharge under state insolvent laws, no matter where the debt originated or is made payable. In other words, the *citizenship* of the parties governs, and not the *place* where the contract was made, or where it is to be performed.

It is perhaps desirable to trace briefly the line of decision leading to and establishing the doctrine as above stated.

Respecting state insolvent laws the controlling constitutional provision is, that "no state shall pass any law impairing the obligation of contracts."

"Any law," to use the language of Mr. Webster, in his argument in *Ogden v. Saunders*, 6 Webs. Works 26, impairs the obligation of a contract *which discharges the obligation without fulfilling it.*"

In *Sturgis v. Crowninshield*, 4 Wheat. 122, the Supreme Court of the United States held such laws to be invalid as to pre-existing contracts. Subsequently the great case of *Ogden v. Saunders*, 12 Wheat. 213, came before the court. Respecting just what that case decided there has been much difference of opinion; but these differences have been set at rest by the later decision in *Baldwin v. Hale*, before cited.

In *Ogden v. Saunders*, one point ruled or declared was, that a state insolvent law or bankrupt law was not a law impairing the obligation of contracts as respects debts contracted *after* the enactment of such law. This was upon the ground, largely if not wholly, that every contract made in a state must be taken to have relation to the existing law of the state which becomes, so to speak, a part of it, attached to it and attendant upon it; and since the insolvent law declares a right on the part of the debtor to be discharged from contracts thereafter made on certain terms, whoever becomes interested in such contracts takes them subject to this right, and the exercise of such right cannot be said to impair the obligation of the contract. It was this point in the case which has been the cause of much controversy in the state courts. In his argument Mr. Webster combated with great force the proposition "that the law itself was part of the contract, and therefore cannot impair it:" 6 vol. Webs. Works, 29.

At present we have no occasion to enter upon a discussion of this vexed proposition—the Supreme Court asserted that a state bankrupt law was not invalid as respects *subsequent* contracts. And the point ruled in *Ogden v. Saunders*, was that a state insolvent law cannot affect the rights of creditors who are citizens of other states.

The second opinion of Mr. Justice JOHNSON (12 Wheat. 258), says Judge CURTIS (Digest, p. 114, § 4), was concurred in on the general question and settled the law involved therein. (On this

point see also, *Boyle v. Zacharie*, 6 Pet. 348, 643; *Cook v. Moffat*, 5 How. 310; *Baldwin v. Hale*, *supra*, per CLIFFORD, J.)

The principle of the decision in *Ogden v. Saunders*, as stated by Mr. Justice JOHNSON, is, "that as between citizens of the same state, a discharge of a bankrupt by the laws of that state is valid as it affects posterior contracts; *as against citizens of other states, it is invalid as to all contracts.*"

In *Cook v. Moffat*, 5 How. 309, the leading case of *Ogden v. Saunders* was reviewed, the soundness of many of the reasons assigned in former opinions questioned, but the court held, among other points, that "a certificate of discharge under an insolvent law will not bar an action brought by a citizen of another state on a contract made with him;" that state insolvent laws "can have no effect on contracts made before their enactment, *or beyond their territory.*" This language, it will be seen, is not free from uncertainty, and does not necessarily exclude the notion if a contract is made originally between citizens of a state and *is to be performed there*, and a non-resident subsequently becomes interested in or the owner of such contract (for example, a bill of exchange), he shall not be bound by a discharge granted in pursuance of a state law in existence at the time when the contract was made. The Supreme Court of Massachusetts, admitting its duty to follow what was *decided* on this subject by the Supreme Court of the United States, held that even as between citizens of different states, a state insolvent discharge was effectual *in cases where it appears by the terms of the contract that it was made and to be performed in the state granting the discharge.* This was in *Scribner v. Fisher*, 2 Gray 43, Mr. Justice METCALF *dissenting*. This decision was followed in other cases in that state which, without reargument, were rested upon it.

In *Demeritt v. Exchange Bank*, 10 Law Rep. 606 (March 1858), Mr. Justice CURTIS, then of the Supreme Court of the United States, in express terms denied the correctness of *Scribner v. Fisher*, stating that it was in conflict with *Ogden v. Saunders* and *Boyle v. Zacharie*. "It is urged," says Judge CURTIS, "that where the contract is *to be performed in the state* it is not within *Ogden v. Saunders*. It has been so held in *Scribner v. Fisher*, 2 Gray 43. But I cannot concur in that opinion. I consider the settled rule to be that a state law cannot discharge or suspend the

obligation of a contract, though made and to be performed within the state, where it is a contract with a citizen of another state."

In *Donnelly v. Corbett*, 7 N. Y. (3 Seld.) 500, 1852, the Court of Appeals of New York; in *Felch v. Bugbee*, 48 Me. 9, s. c., 9 Am. Law Reg. (O. S.) 104, 1860, the Supreme Judicial Court of Maine; in *Anderson v. Wheeler*, 25 Conn. 607, the Supreme Court of Connecticut, and in *Doe v. Puck*, 5 Md. 1, the Supreme Court of Maryland, and there are other similar decisions, decided that the distinction taken in *Scribner v. Fisher* was unsound, and that state insolvent laws had no extra-territorial effect so as to operate upon the rights of citizens of other states.

But in *Baldwin v. Hale*, before cited, the Supreme Court of the United States, in 1863, in terms and by name declared *Scribner v. Fisher* to be in conflict with the settled rule of that court. Mr. Justice CLIFFORD, after reviewing the prior decisions and stating the points ruled, says: "But a majority of the court held in *Scribner v. Fisher* that if the contract was to be performed in the state where the discharge was obtained, it was a good defence to an action on the contract, although the plaintiff was a citizen of another state and had not in any manner become a party to the proceedings. Irrespective of authority it would be difficult, if not impossible, to sanction that doctrine. Insolvent systems of every kind partake of the character of a judicial investigation. Parties whose rights are to be affected are entitled to be heard, and in order to be heard they must first be notified. Common justice requires that no man shall be condemned without notice and an opportunity to make his defence. Courts of one state have no power to require citizens of other states to become parties to insolvent proceedings. \* \* \* Insolvent laws of one state cannot discharge the contracts of citizens of other states, because they have no extra-territorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other state voluntarily becomes a party to the proceeding, has no jurisdiction in the case. Legal notice cannot be given, and consequently there can be no obligation to appear, and, of course, there can be no legal default."

Independent of its authoritative force, this decision and the grounds upon which it is placed, command unqualified approval. Certain it is, that it is the final and settled doctrine of the Supreme



Court of the United States, with respect to a question of which that tribunal is the ultimate arbiter.

Subsequently, the Supreme Court of Massachusetts, in *Kelly v. Drury*, 9 Allen 27, following the decision in *Baldwin v. Hale*, itself overruled *Scribner v. Fisher*.

The Supreme Court of the United States having thus settled that a citizen of another state cannot be affected by an insolvent discharge in the state in which the debtor resides, even though the contract was made and on its face is to be performed therein, that principle settles this case, and shows that the judgment of the District Court was erroneous on the undisputed facts before it.

Those facts were that the judgments sued on were rendered against the defendant in New York; that he afterwards removed to and became a citizen of Iowa; that both plaintiff and defendant were citizens of this state at the time when the judgments were assigned to the plaintiff, at the time the latter brought suit, and at the time the judgment was rendered which is now appealed from.

The discharge was no bar to the plaintiff's action, even though it be admitted that the defendant concluded to remain in New York, and in good faith applied for this discharge as a citizen of that state.

The assignment of the judgments to the plaintiff made him the owner of them and of the debts of which they were the record evidence. He was as much the owner as if they had been recovered in his name. Our statute recognises the plaintiff as the owner, and allows him to sue thereon in his own name. The defendant had notice of the assignment. He owed the debt, and owed it to the plaintiff. He could not afterwards pay to the assignor, or to any person but the plaintiff.

Both parties being citizens of Iowa, and the plaintiff having actually brought suit in Iowa to collect his debt, the plaintiff, though suing upon a New York judgment, was an Iowa creditor, and the defendant would have no more right, as against the plaintiff, subsequently and pending the action, to remove to New York, acquire a discharge which should be valid as against the plaintiff's action in Iowa, than if the defendant had never previously resided in New York, or had while residing there made the contract with the plaintiff at the time a resident of Iowa.

I need not stop to point out the injustice and unreasonableness

of holding that a debtor, pending an action against him, may change his residence, obtain an *ex parte* discharge, resume his residence in the state in which his creditor resides, and then be allowed to plead such discharge as an effectual bar to the plaintiff's action.

The court of no state could, in justice to its citizens, ever give its sanction to such a doctrine, unless it conceived that it was so bound down by authority that it could not unloose itself from its grasp.

The court below undoubtedly proceeded upon the idea of the Supreme Court in Massachusetts in *Scribner v. Fisher*, and counsel undoubtedly did not call its attention to the case of *Baldwin v. Hale*, since it is not referred to in their briefs in this court.

It was suggested on the argument that the court of New York would have control over judgments rendered in that state, and that the case was or might be different from what it would if the contracts on which the judgments were rendered had been transferred to the plaintiff, a resident of Iowa, and had never been reduced to judgment in New York.

The decisions in this court (*Burtis v. Cook & Sargeant*, 16 Iowa 194) treat a judgment rendered as a chose in action. It is a debt, or the record evidence of a debt. The plaintiff, as the assignee, has the same rights as if he had, while a citizen of Iowa, recovered judgment in his own name in New York. In that case it is plain that it could not be discharged against his assent, by a state insolvent proceeding. This suggestion comes right back to the point before discussed and which has been finally set at rest by *Baldwin v. Hale*, viz., that if the creditor is a non-resident of the state a discharge under a state law cannot affect him unless he voluntarily becomes a party to the proceeding, and this is the case irrespective of where the contract was entered into or was to be performed.

Place of making or place of performance is utterly immaterial in all cases where the creditor is not a citizen of the state granting the discharge. *Citizenship of the parties*, and not the place of the making or the place fixed for the performance of the contract, is the controlling element.

As the plaintiff was undoubtedly a citizen of Iowa at the time the defendant obtained his discharge in New York, it is not necessary to decide the question, so warmly debated by counsel, whether

the defendant did in fact acquire a residence in New York at the time he applied for relief under its insolvent laws. To my mind this is doubtful, but as the evidence is conflicting and by no means decisive, we ought not on this ground to disturb the judgment of his Honor below. This has made it necessary to dispose of the case on the assumption that the defendant was not a citizen of Iowa, but was a citizen of New York when he applied for his discharge.

Judgment reversed.

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*Supreme Judicial Court of Maine.*

ELBRIDGE W. ROBINSON v. WARREN WEEKS.

The contracts of infants are :—

- (1). Binding—when for necessities at fair rates ;
- (2). Void—when manifestly and necessarily prejudicial ; and
- (3). Voidable, at the infants' election, either during minority or within a reasonable time after attaining majority : including all executory agreements not for necessities, and all executed contracts of this sort wherein the other party can be placed substantially *in statu quo*.

Mere receipts for money paid for stock in a petroleum company, being for no appreciable value, need not be returned by a rescinding infant before the commencement of his action for the recovery of money thus paid.

ASSUMPSIT for money paid for stock in an oil company.

The plaintiff was born October 31st 1845. On March 3d, and April 18th 1866, the plaintiff paid the defendant \$200, and received therefor only two receipts, one signed by the defendant and the other by the defendant's agent, of the following tenor : "Received of E. W. Robinson, one hundred dollars for one-half of his share in the Mt. Vernon Land and Petroleum Co." On November 12th 1866, the plaintiff repudiated the contract, demanded of the defendant the money paid, and offered to assign to him all interest he might have in the company ; but did not offer to return the receipts.

*Kempton*, for the plaintiff.

*S. Belcher*, for the defendant.

BARROWS, J.—If the receipts which the defendant and his

agent gave for the money which the plaintiff seeks to recover in this action, could be considered as certificates of petroleum stock, the action could not be maintained; for assuredly, if an infant has received anything which may have an intrinsic or a market value, by virtue of the contract which he claims to rescind, he must return it, if it is in existence and within his control after he becomes of age, before he can be permitted to reclaim the money paid for it. It is unnecessary, in this case, to define more carefully or precisely the limitations of this obligation on the part of a rescinding minor to return what he has received under the contract, or to consider further the effect of failure or inability to return anything which has such a value; for the plaintiff was of age and had the receipts in his possession when he claimed to rescind, but did not offer to return them.

But these receipts were of no appreciable value to any one except to the plaintiff as evidence of the fact that he had paid his money for the defendant's promise of a share in the Mt. Vernon Land and Petroleum Company. He never received any certificate of stock. The receipts gave him no legal interest in the company property if there was any. At most they gave him only a right to call upon the defendant for a share of the stock; and that right he renounced in writing as soon as he became of age, coupling with his renunciation an offer to assign over to defendant any interest which he might have in the company. The return of the scraps of paper on which the receipts were written was, under such circumstances, unnecessary.

The plaintiff was a minor when he made the agreement for the stock and paid the money. Making known his election to rescind the agreement and reclaim his money within a fortnight after he became of age and before he had received anything by way of consideration except these papers, he demands his money and brings this suit. Is there any good reason, upon principle or authority, why he should not prevail?

The defendant's position receives countenance from some passages in the text-books.

In Chitty on Contracts (6th Am. ed.) 154, we find the following: "An infant's right to elect whether he will avoid or confirm a contract entered into by him during his infancy, does not necessarily entitle him to recover back money which he has paid thereon. It is indeed a general rule that an infant cannot recover back

money paid by him, even upon a contract which by reason of his infancy he is not bound to complete, there being no imposition."

And Parsons lays it down very broadly, thus: "If an infant advances money on a voidable contract which he afterwards rescinds, he cannot recover the money back, because it is lost to him by his own act, and the privilege of infancy does not extend so far as to restore this money, unless it was obtained by fraud:" 1 Pars. on Contracts (ed. 1853) 268.

The origin of this doctrine is to be found in a *dictum* of Lord MANSFIELD, in the celebrated case of *The Earl of Buckingham v. Drury*, 2 Eden 60. One of the questions in that case was whether an infant could, by contract, bar her dower. When the case came before the House of Lords upon appeal, the opinion of Lord NORTHINGTON that the statute applied only to adults was reversed, and Lord MANSFIELD, in delivering the opinion, said: "If an infant pays money with his own hand without a valuable consideration for it, he cannot get it back again." This doctrine was quoted to support the decision in *Holmes v. Blogg*, 8 Taunt. 508. But it was uncalled for in that case, the pure doctrine of which is that a minor cannot recover money paid on a valuable consideration which he has partially enjoyed, when he cannot put the other party in the same position as before; and in *Corpe v. Overton*, 10 Bing. 252, while the decision in *Holmes v. Blogg* was sustained, the *dictum* of Lord MANSFIELD, and the "strong expressions" in the later case, were reviewed and substantially overruled; and it was held that the plaintiff might recover back, "in an action for money had and received, a sum which, while an infant, he had paid in" advance towards the purchase of a share in defendant's trade, to be forfeited if the purchase was not completed when it appeared that he, on arriving at the age of twenty-one years, had refused to complete the purchase.

The *dicta* of the learned judges in *The Earl of Buckingham v. Drury*, and *Holmes v. Blogg*, *ubi supra*, seem to have been followed in *McCoy v. Huffman*, 8 Cowen 84; *Weeks v. Leighton*, 5 N. H. 343; and *Harney v. Owen*, 4 Blackf. 337; and thus far they do not seem to have been eliminated from the text-books, but they have been practically rejected not only in *Corpe v. Overton*, above cited, but by many courts in cases where the question has arisen whether an infant, who has engaged to labor for a certain period, and after performing part of the work, has rescinded the

contract, can recover for the work he has done. So that Parsons, *ubi supra*, while remarking that "the principle upon which the rule is founded that forbids the infant's recovery of money advanced by him on a contract which he has rescinded, would appear to lead to the conclusion that he could not recover for work done" under such circumstances, admits that the weight of authority is the other way. See *Judkins v. Walker*, 17 Maine 38; *Moses v. Stevens*, 2 Pick. 332; *Vent v. Osgood*, 19 Id. 572; *Thomas v. Dike*, 11 Verm. 273; *Peters v. Lord*, 18 Conn. 337; *Medbury v. Watrous* (overruling *McCoy v. Huffman*), 7 Hill 110; *Whitmarsh v. Hall*, 3 Denio 375; *Lufkin v. Mayall* (overruling *Weeks v. Leighton*), 5 Foster 82; *Wheatley v. Miscal*, 5 Porter (Ind.) 142. Thus it will be observed that all the principal cases where these *dicta* have been followed, have been reconsidered and overruled by the courts in which they were decided. It is true that in *Breed v. Judd et al.*, 1 Gray 455, the right of the minor to rescind an executed contract was made to depend not upon the character of the contract, but upon the finding of the jury, that the consideration by him received was not only adequate but beneficial. That case is apparently in conflict with *Tupper v. Cadwell*, 12 Met. 559, which holds, we think rightly, that what subjects of expenditure are to be termed beneficial to the infant is a matter of law to be decided by the court.

We think the true doctrine is, that the contracts of minors may be divided into three classes: (1) binding—if for necessities at fair and just rates; (2) void—if manifestly and necessarily prejudicial, as of suretyship, gift, naked release, appointment of agents, confession of judgment, or the like; (3) voidable—at the election of the minor, either during his minority, or within a reasonable time after he becomes of age; and this last class includes all the agreements of a minor, which may be beneficial (and are not for necessities), until fully executed on both sides,—and all executed contracts of this sort where the other party can be placed substantially *in statu quo*. How far executed contracts where the other party cannot be placed in as good a position as before must be excepted, and the power of the minor to avoid them denied, it is not necessary here to discuss.

The mere fact that the contract has been fully executed, or that the infant has paid the money with his own hand, does not necessarily affect his right of rescission and recovery: *Williams v.*

*Brown*, 34 Maine 594; *Austin v. Gervas*, Hobart 77; *Price v. Furman*, 1 Williams (Vt.) 268:

The protection which the law supposes the infant to need is as much required against the improvidence which has paid out, as against that which only promises to pay; and where it can be afforded without converting the shield into a sword, it should be given. There seems to be no good reason why, if lands conveyed and goods sold and delivered may be reclaimed by the infant, money paid should not be.

In this case, the contract being legally rescinded, the rights of the parties are the same as if none had been made. He who makes a contract of this class with a minor, assumes the risk of a rescission. The money must be repaid with interest from the date of its receipt.

Defendant defaulted.

KENT, DICKERSON, DANFORTH, and TAPLEY JJ., concurred.

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### *Supreme Court of Wisconsin.*

JAY C. AKERLY, RESPONDENT, v. L. B. VILAS, APPELLANT.

An order of an inferior state court under the Act of Congress for the removal of a cause to a United States court, is reviewable by the Supreme Court of the state, and an appeal to such Supreme Court suspends the vesting of jurisdiction of the case in the United States court until the determination of the appeal.

The Act of Congress provides for the removal of a cause *before trial* if an action at law or *before final hearing*, if a suit in equity, and after a judgment in the inferior court it is too late to remove the cause, although the judgment may be reversed by the Supreme Court of the state, and a new trial or hearing ordered.

THIS was an appeal from an order of the Dane Circuit Court, sending the case to the United States Circuit Court for the District of Wisconsin.

The opinion of the court was delivered by

PAINE, J.—The application for removal was made by the plaintiff under the Act of Congress of March 2d 1867, and the appellant claims that the order was erroneous upon two grounds: 1st. That the case was not within the act; 2d. That if it were within it, the act itself, so far as it professes to authorize a non-resident plaintiff who had commenced his suit in the state court to obtain removal, is invalid.

The respondent's counsel have declined to argue either of these questions, but have contented themselves with simply submitting and briefly

discussing the proposition that this court has no jurisdiction to hear and determine this appeal. Of course, this question must be determined upon the hypothesis that it is possible that the case may not have been within the Act of Congress, and that even if within it, the act may have been invalid. Counsel assume this possibility, for they say that the appellant's remedy " (if indeed he has any) is to apply to the Federal court to remand the case to the state court."

In support of the position they refer to two classes of authorities. But these wholly fail to sustain it, and in truth warrant directly the opposite conclusion. And it would seem impossible to have drawn any such inference from them, except by confounding the distinction between the two classes, and applying the doctrines of both indiscriminately to each. Thus they first refer to several cases, holding that where a proper application for a removal is made, in a case where the party is entitled to a removal by law, the jurisdiction of the state court ceases, and every subsequent step, except that of sending the case away, is *coram non judge* and void. They next cite another class, holding that where the order of removal was improperly made, in a case where the party was not entitled to it, an application may be made to the Federal court to dismiss it for want of jurisdiction, and they then seek to transfer to the latter class of cases the doctrines of the former, and to hold that the jurisdiction of the state court ceases, and every step subsequent to the application for removal is equally as unauthorized and void in those cases where the order for removal is improper and the party not entitled to it by law, as in the others.

Such a conclusion is in conflict with both classes of cases. Both proceed upon the express assumption that it is only when the removal is authorized by law, and the application properly made, that the jurisdiction of the state court is divested, and that of the Federal court attaches. Both proceed upon the assumption that where this is not the case, the jurisdiction of the state court remains, and the Federal court acquires none whatever. And yet we are now asked to hold, that although this case may have been one of the latter class—though it may be one in which there was no law authorizing a removal, and in which, consequently, the Federal court acquired no jurisdiction, yet that by some unaccountable process the state court lost it, so that between the two the jurisdiction has lapsed entirely. Such a conclusion would be extraordinary indeed, and it has as little support in authority as it has in reason.

If there was no law authorizing the removal, and there was none if either of the positions taken by the appellant is true, then the jurisdiction of the state court remained unimpaired, and there was no obstacle in the way of its exercise except the erroneous order that the case be removed. And the idea that the appellate power of the state court cannot be invoked to correct this error—that it remains in abeyance, suspended by such an unauthorized application, that the court which has jurisdiction must decline to exercise it, until the court that has none shall see fit to disclaim it—is one that cannot be supported upon any reasoning.

But if the right to appeal exists in a case where the removal is unauthorized, then it must also exist even when the order of removal is proper. The question whether the court has power to hear and deter-



mine the appeal, cannot depend upon the conclusion to which it may come on the merits of the order to be reviewed.

Nothing is better settled in legal practice, than that an order by which a subordinate court dismisses a case for want of jurisdiction, or in any way divests itself of jurisdiction, is subject to review on appeal. It is within the express provision of our statute that allows an appeal from any order which prevents a judgment from which an appeal might be taken. It is the common practice of all courts. The case of *Mayer v. Cooper*, 6 Wallace 247, cited by the respondent, is one where the Supreme Court of the United States reviewed such an order, made by the United States Circuit Court. It is true in that case the order or judgment of dismissal was reversed, the court holding that the Circuit Court had jurisdiction. But if they had held differently, they would have affirmed the order, and not have dismissed the writ of error. This is the invariable practice. And this shows that the exercise of the power to hear and determine an appeal from an order by which a subordinate court attempts to divest itself of jurisdiction, is not an assertion of jurisdiction in the case subsequent to and in defiance of the application for removal. It is merely the decision upon that application itself. And that decision, whether the power be exercised by a subordinate or appellate court, is not the exercise of jurisdiction in the case. It is the determination of an independent preliminary question, and one which every court, from the necessity of the case, has the power to determine whenever presented.

And whoever invokes the exercise of this power on the part of a subordinate tribunal of the state, must invoke it subject to all the conditions imposed upon that tribunal by the law of its existence, and one of those conditions is that an order made upon such an application is appealable.

That the power to hear and determine an appeal from such an order is entirely independent of the question of jurisdiction to proceed upon the merits of the action, the case of *Nelson v. Leland et al.*, 22 How. U. S. 48, is an express authority. A motion was there made to dismiss the appeal on the ground of a want of jurisdiction originally in the subordinate court, and the chief justice delivered the opinion of the court, "that the question of jurisdiction in the lower court is a proper one for appeal to this court, and for argument when the case is regularly reached, and that this court have jurisdiction on such appeal." The motion was therefore denied, and upon the express ground that their jurisdiction of the appeal was wholly independent of the actual jurisdiction of the lower court, to try the action upon its merits. And if this is so, the exercise of this appellate power is not the exercise of that jurisdiction of which it is claimed the state court is divested by the presentation of a proper application for removal. It is true that if the appellate court should sustain the jurisdiction of the state tribunals, they might proceed subsequently to attempt to exercise it. But the mere determination of the question whether such jurisdiction had ceased or continued is not an exercise of it, any more when made by the appellate than it was when made by the subordinate court.

Indeed, the right and the duty of the state courts to exercise such appellate power has been expressly decided by the Supreme Court of the

United States, in *Kanouse v. Martin*, 15 How. 198. The Court of Common Pleas in the City of New York had denied an application for removal, and afterwards proceeded to try the action on the merits, and rendered judgment. It was taken by appeal to the Superior Court, which affirmed the judgment. And the Supreme Court of the United States reversed that judgment, not on the ground that the Superior Court erred in taking jurisdiction of the appeal, but in neglecting to reverse the judgment of the Common Pleas for refusing the application for a removal. They say: "The error of the Superior Court was, therefore, an error occurring in the exercise of its jurisdiction, by not giving due effect to the Act of Congress under which the plaintiff in error claimed," &c. And it made an order remanding the case to the Superior Court, with directions for further proceedings in conformity to the opinion. And such further proceedings would consist wholly of an exercise of the appellate power of the Superior Court to reverse the judgment of the Common Pleas.

And yet we are referred to this case by the respondent's counsel to support their assertion, that this court will "stultify itself by taking jurisdiction of this appeal."

This court certainly is not oblivious of the fact, that if it should hold that a removal of this suit was unauthorized, and should subsequently proceed to render final judgment after such further trial as may be necessary, the Supreme Court of the United States may assert its appellate jurisdiction over that judgment, may reverse it, and remand the case with directions similar to those in *Kanouse v. Martin*, as counsel suggest. But we feel very confident that if it should do so, it will not be because this court erred in assuming jurisdiction of the appeal, but because it will think this court erred in holding the plaintiff not entitled to a removal.

I have thus endeavored to state the distinction between the exercise of the power to decide upon the application for a removal, whether by the subordinate or appellate court, and the exercise of jurisdiction over the merits of the action, for the purpose of showing that the broad language used by the court in *Gordon v. Longest*, 16 Pet. 104, cannot in any event be applicable to the exercise of such appellate power. But it is perhaps doubtful whether the same language would be now used by that court. The subsequent case of *Kanouse v. Martin* seems studiously to avoid it, and makes no suggestion that the judgment of the Court of Common Pleas, and of the Superior Court were void for want of jurisdiction, but speaks of them throughout the opinion as merely "erroneous." And the same view is also supported by the case of *Hadley v. Dunlap*, 10 Ohio St. 1.

I come, therefore, to the conclusion that this order is appealable, and that it is a duty of this court from which it cannot shrink to proceed to a determination of the questions presented.

Was the case within the provisions of the Act of Congress? The act provides that the non-resident party to a suit in a state court, between a citizen of that state and a citizen of another state, shall be entitled to a removal, on making the proper application, "at any time before the final hearing or trial of the suit." The question arises upon this language: Was the application here made "before the final hearing or trial," in accordance with its intent and meaning?

What was its intent? I think it will not be claimed that the word "final," as used in this provision, applies to or qualifies the word "trial." The word "hearing" has an established meaning as applicable to equity cases. It means the same thing in those cases that the word "trial" does in cases at law; and the words "final hearing" have long been used to designate the trial of an equity case upon the merits, as distinguished from the hearing of any preliminary questions arising in the cause, and which are termed interlocutory. This use and meaning of the words, is too well established and too familiar to require reference. I assume, therefore, that the meaning of the statute is the same as though these words were transposed, and it provided that the application might be made at any time "before trial or final hearing," and that no implication can be raised by attempting to apply the word "final" to the word "trial;" that Congress intended to distinguish between those trials which might only partially dispose of the case, and such as might occur afterwards, and to allow this right of removal so long as any question yet remained to be tried, in order to the complete disposition of the suit. It will be observed that in the Act of 1866, of which this is amendatory, the words were so transposed, and the application was required to be made "before trial or final hearing;" and their transposition in the present statute was evidently merely casual, not designed to effect, and not effecting any change whatever in their meaning. The obvious intention of the statute was to require the party desiring to apply for a removal to do so before trial in actions at law, and, what is the same thing, before final hearing in actions in equity. The reason and justice of this, if a removal is to be allowed at all, are apparent. Only the non-resident can apply for it. And it would constitute the very essence of injustice to give him the right to experiment upon the decisions of the state tribunals, obtaining those which if in his favor would be binding and conclusive upon the other party, but which if against himself, he could repudiate and take his chances again in a new tribunal. The statute did not intend to provide for any such wrong, but on the contrary clearly designed to exclude the possibility of it, by requiring the application to be made before trial or final hearing. It seems clear, therefore, that whenever in any state court there has been a trial in an action at law, or a final hearing in an action in equity, the result of which was an adjudication, which upon the principles governing judicial decisions would be final between the parties, as to any portion of the merits of the action, the case has passed beyond the stage when it was within either the letter or the spirit of the law.

How was it with this suit in that respect? It was an equitable action brought in 1860 to foreclose a mortgage in the Circuit Court of Dane county. The defendant, in accordance with the practice prevailing in this state, interposed by way of defence certain counter claims, growing out of and connected with the transactions in which the mortgage originated.

To these there was a demurrer by the plaintiff, which was overruled, and the order overruling it was affirmed on appeal to this court. Various proceedings were subsequently had, and the case was then brought to final hearing, and a decree rendered in favor of the defendant, dismissing the complaint. That was reversed on appeal to this court, and another final hearing was had in which the plaintiff obtained a judg-

ment. That was reversed by this court and the cause remanded for further proceedings; and at that stage of it this application for a removal was made. It will be seen, therefore, that instead of being made before final hearing, it was not made until after there had been two final hearings. And it is no solecism to speak of two final hearings in an equity case, any more than it is to speak of two trials in an action at law.

It is material then to consider what was the effect of the several decisions of this court in respect to the rights of the parties as to the matters involved in them. No doctrine is better settled here than that the matters decided become *res adjudicata*; those decisions became the law of the case, binding upon the parties, binding on the subordinate court, and disposing finally of the questions decided. Whatever further proceedings might be necessary to the ultimate disposition of the case, those questions were no longer open: *Luning v. The State*, 1 Chand. 264; *Parker v. Pomeroy*, 2 Wis. 112; *Downer v. Cross*, Id. 371; *Cole et al. v. Clark*, 3 Id. 323; *Jones v. Reed*, 15 Id. 40.

If this rule were peculiar to this state, still the decisions of this court would govern, as to the effect of our own judicial proceedings between the parties. But the same rule prevails everywhere; and it has been asserted by the Supreme Court of the United States quite as strongly as by any other tribunal. In *Martin v. Hunter (Lessee)*, 1 Wheat. 304, counsel raised a question as to the propriety of a former decision, the case having already been before the court on a former writ of error. On page 355, the court say: "In the next place, in ordinary cases, a second writ of error has never been supposed to draw in question the propriety of the first judgment, and it is difficult to perceive how such a proceeding could be sustained upon principle. A final judgment of this court is supposed to be conclusive upon the rights which it decides, and no statute has provided any process by which this court can revise its own judgments. In several cases which have been formerly adjudged in this court, the same point was argued by counsel and expressly overruled. It was solemnly held that a final judgment of this court was conclusive upon the parties, and could not be re-examined." So it was held that the same rule prevailed in equity, and that a second appeal to that court, brought up only the propriety of the proceedings in the court below, subsequent to the mandate on the first: *Hopkins v. Lee*, 6 Wheat. 113. In *Ex parte Sibbald*, 12 Pet. 492, that court said, "a final decree in chancery is as conclusive as a judgment at law. Both are conclusive of the rights of the parties thereby adjudicated." See also *Bridge Co. v. Stewart*, 3 How. 413; *Roberts v. Cooper*, 20 Id. 480.

It appears, therefore, that by the principles universally recognised as applicable to the effect of judicial proceedings, there had been several trials of this case, both in the subordinate and appellate courts of this state, and several judgments by the latter, which, so far as our judicial system is concerned, were final and conclusive between the parties, as to the questions decided.

It is true those judgments did not finally dispose of the case. But that fact does not at all impeach their finality as to the matters disposed of by them. There are few important cases but what are carried more than once into the appellate courts. But the fact that the judgments of those courts do not in the first instance completely dispose of the

case, has never been supposed to annul their effect entirely, and to place the case, when it got back into the subordinate court, precisely as it would be if there had never been any trial or appeal whatever. On the contrary, as the authorities above referred to fully show, when the case gets back into the inferior court, it carries with it the judgment of the superior as the established law of the case, and no questions are open to further examination except those which that judgment has left open.

A trial or final hearing consists of the examination and determination both of questions of fact and law. In equity cases the court may determine both. On appeal this court may determine both. But the case may have been so presented that we could only properly determine the questions of law, leaving a further trial upon a part or all of the facts necessary for a complete adjustment of the controversy. This was true in this suit. The struggle in the case was upon the questions of law growing out of the defendant's counter claims. Those questions were fully considered, and finally decided on the last appeal to this court; and the case was remanded for such further trial upon the questions of fact, as was necessary to its final determination. And yet after all these years of litigation, these repeated hearings and judgments both of the subordinate and appellate courts of this state, it is now claimed that this application for a removal was made "before trial or final hearing." If such had been the intention of Congress, I cannot think it would have stopped where it did. If it would set aside and destroy the effect of repeated trials and judgments, why hesitate before the last one? If it would intervene after all the most important questions in the case had been tried and passed into judgments, binding and conclusive on the parties, why pause before the fact that some question, perhaps a minor and unimportant one, still remained to be tried, in order to a complete disposition of the case? When tried, the judgment concerning it could be no more final, no more binding, than the previous judgments had been, as to matters involved in them. Hence, if they were to be overthrown, why not overthrow the whole, and allow the party to remove his case, and try it anew in a court of original jurisdiction, after it was finally and wholly disposed of by the judgment of the state court? There could be no greater objection to the justice of such a law, than there is to it as it now stands, if it is to have the effect contended for. If the effect of two trials and judgments in all the state courts was to be annulled, there could be no reason why the same thing should not be done as to three or any other number necessary to dispose of the case.

But the act furnishes no evidence of such intention. On the contrary, both its letter and spirit exclude it. The law had formerly allowed only non-resident defendants to apply for a removal. And they were required to be prompt, and to make their election at the outset, and before taking any steps which could be construed into a voluntary submission to the jurisdiction of the state court. This act designed to extend the right to non-resident plaintiffs as well. It designed to extend the time, so that the application might be made at any time before trial or final hearing. But it did not design to go so far as to allow the party actually to submit his case to the judgment of the state court on the merits, and then, if its judgment should be against him, but should not happen to finally determine the case, to exercise his right of removal. To induce a court of justice to infer a design to effect such an object, to

borrow the language of Chief Justice MARSHALL, "the intention should be expressed with irresistible clearness." But here, so far from that being the case, Congress has explicitly required that the application shall be made "before final hearing or trial." And the spirit and object of the act unite with its letter, in conducting imperatively to the conclusion that its meaning was to require it to be made before the party had voluntarily submitted his case to any trial or final hearing whatever in the state court.

Nor is this conclusion at all impeached by the rule that has been established by the Federal and other courts, under statutes authorizing appeals or writs of error from final judgments or decrees. It is generally held there, that the decree or judgment must be one purporting a full and final disposition of the case, and not on its face reserving a part of it for future decision by the court; yet, even in those cases, the rule has not been held with unreasonable strictness, but those decrees which substantially dispose of the merits of the controversy, are held final so as to allow an appeal, although some matters essential to a complete execution of the decree are reserved for further examination and decree. Thus, in *Forgay v. Conrad*, 6 How. U. S. 201, a decree was passed disposing of the general merits of the action, but directing an account of rents and profits, and reserving that subject for further decree. A motion was made to dismiss, on the ground that the decree was not final. The court said: "The question upon the motion to dismiss is, whether this is a final decree within the meaning of the Acts of Congress. Undoubtedly it is not final within the strict technical sense of that term. But this court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature." See also *Bronson v. Railroad*, 20 How. 524, 531. But even if under this class of statutes it were held that the decree or judgment must be absolutely final to authorize an appeal, no argument could be drawn from it by analogy against the conclusion already arrived at. The difference in the objects of the two statutes would at once furnish an answer. The one is designed to regulate the exercise of an appellate jurisdiction, by which the judgments of an inferior tribunal may be reviewed. It is natural in such case to require the inferior court first to dispose, substantially at least, of the whole case, before the appellate power could be invoked. But the object of the other statute was not to provide for a review of the decisions of an inferior tribunal, but for the exercise of an election by a party to a suit in a state court, to transfer it to another court of original jurisdiction for trial. The design was to authorize an election between the two; not to give him a chance at both. And this object can only be accomplished by requiring, as the statute does, the application to be made before any trial or final hearing in the case. The object of the one statute was to prevent an appeal until everything had been decided. The object of the other was to authorize a removal only before anything had been decided.

It seems to me clear, therefore, that this case was not within the Act of Congress, and that the order for removal was unauthorized. I am aware that the learned judge of the District Court of the United States for this district has reached a different conclusion. His opinion upon

the subject is published in the American Law Register for April 1869. Upon this point he says: "If the cause had been finally determined by either judgment of the Circuit Court, or by order of the Supreme Court; then the application for removal would not have been filed before 'the final hearing or trial.' But the last order of the Supreme Court reversing the judgment of the Circuit Court, and remanding the cause to that court for further proceedings according to law, opened the whole case to litigation, *the same as if no judgment had ever been rendered*. The Supreme Court in effect ordered a *venire facias de novo*, which required the Circuit Court to hear the cause as if no hearing or trial had taken place."

If this is so, then this Court has been laboring under a great delusion. If, after a case has been three times in this court, twice on appeal from final judgments in the court below, if after the essential vital legal questions upon which its decision depends have been solemnly adjudicated by this court, and the cause remanded to the Circuit, it starts there anew, with nothing settled, "the whole case opened to litigation, as if no judgment had ever been rendered," then are not only our labors fruitless indeed, but those of the unfortunate litigants in the state courts are vainer than the labors of Sisyphus.

We have not so understood the law. We have uniformly applied to our decisions, so far as relates to matters within our jurisdiction, the same rule which the Supreme Court of the United States applies to its decisions; and have held that they become the law of the case, binding on the parties and the subordinate courts, and that the questions decided are not open to further litigation. We cannot have erred in this, unless the decisions of this court constitute an exception to the rule by which those of all other courts are governed.

I cannot but regret that this difference of opinion has arisen between this court and the learned judge of the District Court. It may be the cause of much embarrassment and expense to the parties. But inasmuch as the difference does exist, I know of no way to avoid its consequences, whatever they may be. There seems but one course open to this court, consistent with its duty to itself and to the state, when its appellate power is invoked in the regular course of judicial proceedings, and that is, to exercise the jurisdiction which it believes itself to possess, according to its best judgment whether that be well or ill founded.

As the conclusion already arrived at makes it unnecessary, I shall not enter upon the question whether it is competent for Congress to authorize a non-resident plaintiff who has voluntarily brought his suit in the state court to obtain a removal. I will only say that there is a marked difference between such a law and that which has heretofore been in force.

The appellate jurisdiction of the United States Supreme Court over the state courts has been sustained by the decisions of that court, and generally acquiesced in. And the validity of the twelfth section of the Judiciary Act, authorizing a non-resident defendant sued in a state court to have the case removed for trial to the Federal courts, has also been sustained as an alleged branch of the appellate power. But the argument by which a proceeding apparently so incongruous, as one by which the courts of original jurisdiction in one judicial system wrench a case bodily from the courts of original jurisdiction of another distinct

judicial system created and organized under another constitution of government, is attempted to be sustained, is not that there is any express provision in the Constitution of the United States to that effect, but that the proceeding is necessary in order to give effect to the general grants of judicial power which it contains. It is said that as questions may arise concerning the Constitution and laws of the United States, in suits pending in the state courts, and as citizens of other states may be sued as defendants in those courts, and as the judicial power of the United States extends to such controversies, unless there is a right of appeal and removal there is no way in which that judicial power can reach such cases. The argument rests therefore almost entirely on the assumed necessity of such right, in order to give effect to the grants of judicial power. Powerful arguments have certainly been made against the existence of the right in any case. These have been drawn from the acknowledged independence and sovereignty of the state and Federal governments, each within its own sphere, which doctrine has often been asserted by the Supreme Court of the United States. They have expressly told us that the separation of the two governments is so complete that Congress can vest no part of the judicial power of the United States in any state court, and can impose no duty whatever on any state officer. In view of these conclusions it is certainly difficult to show, by any satisfactory reasoning, by what authority Congress can authorize a Federal court to acquire original jurisdiction through the process and proceedings of a state court. These considerations, joined with the fact that by the ordinary rules of interpretation the general grants of judicial power, original and appellate, in the Constitution of the United States, would, in the absence of any professed intention on its face to regulate any other judicial system, be held to relate solely to the judicial system established by itself, have led many able minds to deny the existence of any power whatever to transfer a case by appeal or otherwise from a state to a Federal court. But against these arguments the power has been upheld, as already remarked, upon the ground of its absolute necessity, in order to give effect to the grants of judicial power. But if the power rests upon that ground, the necessity which gives it birth would seem to constitute its limit.

And in respect to a non-resident plaintiff, who voluntarily brings his suit in a state court, that necessity fails entirely. A right of removal is not necessary there, to enable the judicial power of the United States to reach the case, because he might have brought the suit in the Federal court in the first instance.

The constitutional grant had full effect from the outset, and the party in whose behalf the right to have the case tried in the Federal court is claimed, had it fully provided for him. Whether after he voluntarily waived it and sued in the state court, there is any power to provide for a removal of the suit in his favor, is certainly a different question from any that has been yet decided by the Supreme Court of the United States. There is at least some ground for denying the power in such a case, without impeaching the right of appeal and removal so far as they have already been sustained. Whether upon full examination this ground would be found sufficient, I shall not attempt further to inquire. But I will say that if this act is to have the effect claimed for it, if after



a non-resident has pursued a citizen of this state through years of expensive litigation in the state courts—if after all the important and vital questions in the case have passed into judgment, as between the parties, and he sees his antagonist about to pluck the fruits of his toil and sacrifice, he can by an affidavit under this statute turn those fruits to ashes, and transfer his case to another court of original jurisdiction to start anew, certainly such results will challenge for the act the closest scrutiny of the grounds upon which the power to pass it is asserted.

The order appealed from must be reversed, and the cause remanded for further proceedings.

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## ABSTRACTS OF RECENT AMERICAN DECISIONS.

### SUPREME COURT OF KANSAS.<sup>1</sup>

### SUPREME COURT OF NEW HAMPSHIRE.<sup>2</sup>

### SUPREME COURT OF NEW YORK.<sup>3</sup>

#### ARBITRATION.

*Submission of a pending Action.*—A mere submission to arbitration will not be a discontinuance of a pending suit where, by express agreement or necessary implication, the cause is to be kept on foot until the arbitration is perfected by an award: *Lary v. Goodeno*, 48 N. H.

Such an agreement will be implied from a stipulation, that judgment shall be entered on the report or award: *Id.*

Where under a misapprehension as to the effect of a submission to arbitration the action is entered "neither party," it is a proper exercise of discretion to strike off such entry and let the cause stand for trial: *Id.*

Whether a mere submission to arbitration will operate as a discontinuance of a pending suit, even if there is no agreement to enter judgment on the award, *quere*: *Id.*

#### ASSUMPSIT. See Contract.

*Money received by Public Officer, and not appropriated to the purpose of his Office.*—If the prudential committee of a school district receive the money assigned to the district for the support of schools, and neglect to appropriate it to that use, the district, after the committee's term of office has expired, may recover the money in an action for money had and received: *School District No. 7 in Auburn v. Sherburne*, 48 N. H.

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<sup>1</sup> From Hon. C. K. Gilchrist; to appear in 5 Kan. Rep.

<sup>2</sup> From the Judges; to appear in 48 N. H. Rep.

<sup>3</sup> From Hon. O. L. Barbour, Reporter; to appear in vol. 53 of his Reports.

## BOUNTY.

*Commissioned Officer.*—A man who entered the army as a commissioned officer of volunteers, is not entitled to the bounty voted by a town under the statute, which authorized towns to raise and appropriate money "to encourage enlistments in the army:" *Hilliard v. Stewartstown*, 48 N. H.

## BROKER.

*Power to bind Principal.*—An authority to sell, given to one whose occupation is that of a real estate broker, authorizes the broker to sign the contract and bind his principal: *Pringle v. Spaulding*, 53 Barb.

COMMON CARRIER. See *Railroad*.

## CONSTITUTIONAL LAW.

*Trial by Jury—Opportunity of Defence.*—The Act of July 3d 1863, entitled "An act in relation to damages occasioned by dogs," so far as it undertakes to charge the owner with the amount of damage done by his dog as fixed by the selectmen of the town without an opportunity to be heard, is unconstitutional; because it is contrary to natural justice and not within the scope of legislative authority conferred by the constitution on the General Court; and also because it is in violation of the provision in the Bill of Rights, which secures the right of trial by jury in all controversies concerning property, except in cases where it had not theretofore been used and practised: *East Kingston v. Towle*, 48 N. H.

An act may be in part beyond legislative authority and within it for the residue, and, if it is capable of being administered in the parts which are within the power of the legislature to enact, it will so far be a valid law: *Id.*

The legislature have power to make towns liable for damage done within their limits by dogs, and to give towns a right of action to recover the actual damage from the owners of the dogs: *Id.*

A town may maintain an action against the owner of a dog under the Act of July 3d 1863, and recover the amount of actual damage done as found by the jury on trial, not exceeding the amount of the order drawn for the damages by the selectmen: *Id.*

On the question whether the defendant's dog did the damage, the character of the dog is not competent evidence, nor the fact that he had killed other sheep: *Id.*

CONTRACT. See *Frauds, Statute of*.

*Rescission.*—To entitle a party to recover back money advanced to a corporation for shares of its capital stock, upon the ground of a failure to issue it according to agreement, the party must rescind the contract and demand the money before suit: *Swazey v. Choate Manufacturing Co.*, 48 N. H.

*Reward offered for Arrest of Criminals.*—Under a statute authorizing the mayor and city council of any city, or the selectmen of any town, to offer and pay from the treasury of such city or town a suitable reward,

not exceeding \$300, for apprehending and securing a person charged with a capital or other high crime, any city or town may be bound by an offer of a reward in such cases; and any person who performs the service relying upon such offer, may in an action of *assumpsit* recover the amount offered of such city or town: *Janvrin v. Town of Exeter*, 48 N. H.

*Ten Hours' Work as a Day's Labor.*—Under the statute, which provides that in all contracts for, or relating to, labor, ten hours of actual labor shall be taken to be a day's work unless otherwise agreed by the parties, if work is done through the season at a certain agreed price per day, and the work done from time to time in a day is done and accepted without objection as a day's work, an agreement may be implied that the work done in a day, whether more or less on an average than ten hours, shall be reckoned and paid for as a day's work: *Brooks v. Cotton*, 48 N. H.

#### CRIMINAL LAW.

*False Pretences—Evidence.*—Where the false pretences consist in words used by the defendant, it is sufficient to set them out in the indictment as they were uttered, without undertaking to explain their meaning: *State v. Call*, 48 N. H.

Upon an indictment for obtaining goods by falsely pretending that the buyer owed but little, and had ample means to pay all his debts, and that his note for \$250 was good, it is competent for the state to prove that within three days after he mortgaged the greater part of his personal property to another, as bearing upon his intent in making such representations: *Id.*

#### DAMAGES.

*For Breach of a Contract to sell Land.*—In an action to recover damages for the breach of a contract to sell real estate, the proper rule of damages is the amount paid by the purchaser on executing the contract, together with the difference between the contract-price and the actual value of the premises, at the time the contract was to have been performed: *Pringle v. Spaulding*, 53 Barb.

DEBTOR AND CREDITOR. See *Husband and Wife*.

#### ESTOPPEL.

*Misrepresentation as to Ownership of Goods.*—If the owner of goods voluntarily represent that the goods belong to another, and the party to whom the representation is made, relying, and having reason to rely, on the representation as true, attach the goods for a debt due from the party to whom it was represented that the goods belonged, in trover for attaching the goods, the owner will not be permitted to show that his representation was false, though at the time when he made it he had no notice of the debt on which the goods were attached: *Horn v. Cole*, 48 N. H.

*Encouraging other Persons to Purchase.*—Where the plaintiff having a claim of dower in premises advertised to be sold by a receiver, attended the sale, and requested the defendant to purchase the property, stating

that she had no claim thereon, on the faith of which the defendant became the purchaser, and the plaintiff subsequently took a lease of the premises from him: *Held*, that these circumstances worked a perfect and effectual *estoppel in pais*, against any claim or title of the plaintiff in hostility to that which the defendant acquired at such sale: *Maloney v. Horan*, 53 Barb.

#### EVIDENCE.

*Witness—Competency—Admissions.*—After the entry of a suit by a minor by her next friend, she died, and her administrator was admitted as the party to prosecute the suit: it was held that the wife of such next friend was a competent witness for the plaintiff: *Taylor v. The Grand Trunk Railway*, 48 N. H.

Held, also, that it was too late to object to her competency after the direct examination in her deposition had been read, the counsel being aware of her situation at the commencement: *Id.*

The admission of the representations of a sick person should be confined to such expressions as furnish evidence of the present condition of the patient, excluding carefully everything in the nature of a narrative of what is past: *Id.*

The statement that a person was lamer in the morning than the day before, is not matter of opinion but a statement of a fact, and not objectionable: *Id.*

The admissions of the father of the person alleged to be injured, and bringing suit for the injury, made before her death, are not admissible against her administrator, unless it be shown that the father is the real party in interest for whose benefit the suit is prosecuted: *Id.*

If this be shown the admissions would be competent, although when they were made the father had no interest: *Id.*

But the mere fact that the estate of the daughter would descend to the father subject to the claims upon it, would not make him the party to the suit, so as to render his admissions competent: *Id.*

The testimony of a physician that injuries from railroad accidents were more severe than from other causes, though bearing the same external appearance, is admissible, although his knowledge is derived from study alone: *Id.*

On the cross-examination of a witness offered by the railroad, and who had charge of the section where the alleged injury happened from a defective rail, it is proper to ask him if he was short of iron at the time: *Id.*

#### EXECUTION. See *Partnership*.

*Trustee—Process—Practice.*—Under the general statutes the answers of the trustees are to be written by the magistrate as in the case of other depositions; and they cannot insist upon the right to retire with their counsel and prepare the answers: *Morrison, Administrator, v. Annis*, 48 N. H.

But the provisions of the general statutes do not apply to pending suits, no intention that they should being expressed; and, therefore, trustees in suits then pending have the right to retire and prepare their answers, with the aid of counsel: *Id.*

## FRAUDS, STATUTE OF.

*Contract for Labor not within.*—If a contract be essentially for the sale of goods, whether they are then manufactured or not, it is within the Statute of Frauds; but where the labor and skill of a workman are of the essence of the contract the statute does not apply, although they are to be expended in the production of goods and chattels, and from the workman's own raw materials: *Pitkin et al. v. Noyes*, 48 N. H.

The same doctrine will apply to an agreement to raise three acres of potatoes and deliver them to the other party, at a fixed price per bushel; the inquiry being whether it was of the essence of the agreement that the contractor should himself raise the potatoes: *Id.*

The compromise of doubtful and conflicting claims, understood so to be by the parties, is a good and sufficient consideration to uphold an agreement; although it would be otherwise if the claim was utterly without foundation, and known to be so: *Id.*

*Part-performance—Performance within the Year.*—A contract for the sale of 700 cords of wood upon a certain lot of land, at \$5 per cord, made on the 1st of January, the vendor to deliver as much thereof as he could that winter, and the balance thereof during the next following winter and year, the buyer to pay for what was delivered at the close of each winter's delivery, is an entire contract of sale of the whole quantity; and a delivery and acceptance of a part the first winter will take the case out of the Statute of Frauds: *Gault, Brown & Co. v. Brown et al.*, 48 N. H.

And it was held, also, that this was not a contract which was not to be performed in one year, within the meaning of that statute: *Id.*

*Authority of Agent.*—The Statute of Frauds does not require that the authority of the agent contracting for the sale of lands should be in writing. It may be established by parol, and it will be inferred, where the principal adopts the act of the agent: *Pringle v. Spaulding*, 53 Barb.

*Agreement for Sale of Lands.*—By the Statute of Frauds an agreement for the sale of lands, to be valid, must be binding upon all the parties by whom the sale is to be made: *Snyder v. Neefus*, 53 Barb.

The word "party," in the statute, means all the vendors, when more than one are included in the contract of sale: *Id.*

*Subscription by Agent—His Authority.*—Where an agreement for the sale of land owned by two persons as tenants in common, is subscribed by a third person as their agent, it must appear that he was duly authorized by both the vendors to sign the contract. If authorized by one only, the agreement is not binding upon either of the parties thereto: *Id.*

To be binding, the contract must be signed by the vendors, all of them, personally, or by an authorized agent, and the contract as it appears on its face must be assented to by the vendee: *Id.*

## HIGHWAY.

*Petition to open—Practice.*—Where upon a petition to lay out a highway the county commissioners report against it upon the merits, and there is judgment upon the report; it was held, that another peti-

tion for the same highway at the expiration of two years ought not to be referred to the county commissioners, if it was made to appear by testimony laid before the court that there was no change of circumstances, but that the case was substantially the same; and that in such case the petition ought to be dismissed: *Whitcher et al. v. Town of Landaff*, 48 N. H.

*Opening of—Practice.*—Objections to the form of a petition for a new highway must be taken before the reference to the county commissioners, or they will be considered as waived; and this applies to an omission to state when application was made to selectmen: *Wensworth v. Town of Farmington*, 48 N. H.

Where there was an application for a highway filed with the clerk of the court, and an order of notice issued before January 1st 1868, it will be considered that the proceedings were had and commenced and were pending when the general statutes took effect, and therefore that the proceedings must be governed by the old law: *Id.*

Accordingly, where the commissioners imposed part of the expense of making the road upon towns out of the county, it was held that the report must be recommitted: *Id.*

#### HUSBAND AND WIFE.

*Divorce—Support of Child born after Decree.*—The husband and wife were divorced by the District Court of Leavenworth county upon her application, and the custody of the three minor children was awarded to her. Two days after the decree a fourth child was born. In an action of debt brought against the father for the entire support and education of all the children by the mother, held that she could not recover in such action: *Harris v. Harris*, 5 Kan.

That the only way for relief was by opening the decree as to the children, and making such provision for them as might be just under all the circumstances, or by other proper proceedings under or supplemental to the original decree: *Id.*

*Effect of Wife's joining in Conveyance.*—The legal effect of a wife's uniting with her husband in a conveyance of his lands is to release her dower. Before admeasurement, she has no interest or estate in the lands, and her deed operates not as a grant, but as an estoppel: *Maloney v. Horan*, 53 Barb.

When the deed of the husband has been avoided at the suit of creditors, on the ground that it was made with intent to hinder, delay or defraud them, there remains an estate in the fraudulent grantee, which is sufficient to support or feed this estoppel; for the fraudulent deed is good and effectual as between the parties to it. A payment by the fraudulent grantee or grantor to the creditors of their debts, would extinguish the same, and render his title valid: *Id.*

*Merger of Dower.*—Where a wife, after having knowingly and designedly participated in her husband's fraud, by joining with him in conveying his land to a third person, for the purpose of defrauding his creditors, takes from such fraudulent grantee a conveyance of the same premises, the court will not help her to undo the consequences of her

acts, one of which was to accept a merger of her dower, in the fee conveyed to her: *Maloney v. Horan*, 53 Barb.

As a wife cannot be endowed of her own lands, the taking of such a conveyance will destroy the claim, if any, which previously existed: *Id.*

#### INFANT.

*Disaffirmance of Contract.*—An infant may recover for what he has paid or done while an infant in execution of his voidable contract, by restoring what he received under the contract, if it remain in specie, or, if not, by accounting for the value of it: *Heath v. Stevens*, 48 N. H.

Where an infant received money under his contract, and afterwards while an infant paid money in execution of the contract, in an action to recover back money paid under the contract, it is not necessary that the infant should first repay the money he received under the contract; but he must account for so much towards the sum which he paid in execution of the contract: *Id.*

Where the consideration of an infant's contract consisted partly of money paid for him, and partly of an undertaking by the defendant involving uncertain risks, if the infant seeks to recover back money paid by him in execution of the contract, it must be left to a jury to determine what, under all the circumstances, it was reasonable the infant should engage to pay; and that sum should be allowed to the defendant against the money paid by the infant in execution of the contract, and the balance, if any, recovered by the plaintiff: *Id.*

#### LANDLORD AND TENANT.

*Lease of Farm Land—Construction.*—In a lease of a farm for two years, it was stipulated that for every ton of hay produced and not consumed on the farm, the lessee should leave, or haul on to, and use on the same, one extra half cord of good dressing; and at the expiration should leave on the farm dressing in value equal to what he finds there at the commencement of the lease; and that he shall carry on the farm during the term in a good husbandlike manner, and will not commit strip or waste:

Under this lease it was held that the tenant was to use on the farm, or leave there for use, all the manure made there in the usual course of husbandry, together with what he was to bring on for hay sold off. And that he was not entitled to sell or carry off any of such manure, notwithstanding he might leave at the end of the term as much as he found there: *Hill v. De Rochemont*, 48 N. H.

*Held*, also, that the tenant was not at liberty to carry off manure made from eel-grass gathered on the farm, and mixed with manure made by the cattle and pigs on the farm: *Id.*

#### LIMITATIONS, STATUTE OF.

*Mortgage with Collateral Agreement as to Time of Payment.*—A note and mortgage were given on the 22d day of May 1862, due one day after date: at the same time, and as part of the agreement of the parties, the obligees in the note gave the obligor an instrument of writing, stipulat-

ing that the obligor should have five years' time in which to pay the note :

*Held*, that no right of action accrued on the note until the expiration of five years, and consequently the Statute of Limitations did not begin to run till five years had expired : *Round v. Donnell & Saxton*, 5 Kan.

MUNICIPAL CORPORATION. See *Constitutional Law*.

NEGLIGENCE. See *Railroad*.

OFFICER. See *Assumpsit*.

#### PARTNERSHIP.

*Levy by Partnership-Creditor on Land of One Partner*.—After the levy of an execution on the land of a partner for a partnership debt has become complete by the lapse of a year from the time of the levy, a creditor of the individual partner cannot defeat the levy for the partnership debt by attaching the same land and levying his execution on it : *Bowker v. Smith*, 48 N. H.

#### PROBATE COURT.

*Will creating Trust—Jurisdiction over Trustee*.—Where a will creates a trust and appoints the trustees, the Court of Probate, in which the will was proved, and the estate administered, has not jurisdiction to determine conflicting claims to the trust fund, and compel the trustees to execute the trust according to the intent of the will : *Hayes v. Hayes*, 48 N. H.

#### PROMISSORY NOTES.

*Waiver of Demand and Notice*.—Any act of an endorser of a promissory note calculated to put the holder off his guard, and prevent him from treating the note as he would otherwise have done, is, in judgment of law, a waiver of demand and notice : *Sheldon v. Horton*, 53 Barb.

Thus, where the holder of a note told the endorser, sixteen days before it fell due, that the maker wanted the note to remain another year, and asked him if he was willing, at the same time taking the note, looking it over, and saying it was a good note : *Held*, that this excused a demand and notice of non-payment : *Id*.

#### RAILROAD.

*Negligence—Degree of Care required*.—Common carriers of passengers are bound to the exercise of the utmost care and diligence of very cautious persons, and are responsible for any, even the smallest negligence : *Taylor v. Grand Trunk Railway*, 48 N. H.

The standard of care and diligence required of a railroad in carrying passengers, does not depend upon its pecuniary condition or the amount of its revenues ; but it is bound to provide a track, rolling-stock, and all other agencies suited to the nature and extent of the business it assumes to do : *Id*.

A direction to the jury that a railroad must use such a degree of care



as is practicable, short of incurring an expense which would render it altogether impossible to continue the business, is erroneous and calculated to mislead the jury: *Id.*

Where an injury upon a railroad is caused by the gross negligence of the corporation, the jury may, if they think proper, award exemplary damages: *Id.*

#### REPLEVIN.

*Title to Property replevied.*—In an action of replevin, under the code of civil procedure of 1859, where the plaintiff gave bond and took possession of the property replevied, neither the suing out of the writ nor the giving of the bond changed the title of the property; and if the defendant was an officer holding the property by virtue of a levy, under an order of attachment, or an execution, his lien on the property was not destroyed, but only suspended until final judgment in the replevin case, and then if the judgment was in his favor, and for a return of the property, he might retake it whenever he chose to do so: *Keyser & Co. v. Stein*, 5 Kan.

A person who became the surety on the replevin-bond and took the property into his possession to indemnify himself, was not an innocent or *bonâ fide* purchaser, and obtained no better rights to the property than the plaintiff had: *Id.*

The plaintiff in replevin under said code was bound only to prosecute the action to final judgment, pay the costs and return the property, if such was the judgment of the court; and such judgment being the final adjudication between the parties, neither party could resort to any other proceeding afterwards, but must look to that judgment alone for his rights and his remedies; thence if the defendant in replevin obtained no judgment for a return of the property, the title to the same at once vested absolutely in the plaintiff: *Id.*

TEN HOUR LAW. See *Contract*.

TOWN. See *Constitutional Law*.

TRUSTEE. See *Probate Court*.

TRUSTEE PROCESS. See *Execution*.

WILL. See *Probate Court*.

WITNESS. See *Evidence*.

*Party—Action against Executor.*—Under the law of June 1865, ch. 4074, a party will not ordinarily be allowed to testify when the adverse party is an executor or administrator, unless the latter elect to testify: *Brown and Wife v. Brown*, 48 N. H.

But in respect to transactions and admissions arising since the decease of the testator or intestate, it would be a proper exercise of discretion to allow the living party to testify: *Id.*

THE

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THE POWER OF THE PRESIDENT TO GRANT A GENERAL PARDON OR AMNESTY FOR OFFENCES AGAINST THE UNITED STATES.

(*Continued from p. 532.*)

THE report of the Senate Judiciary Committee very justly says that the knowledge of these terms, *amnesty*, *pardon*, *reprieve*, and of their settled meaning and effect under the English system of government, must have existed in the Constitutional Convention of 1787; but then proceeds to insist that the Convention, by not using the word *amnesty* in the article conferring power on the President "to grant pardons," must be understood as intending not to invest him with any power to grant amnesty for offences against the United States. Of course, the intention of the framers of the Constitution is the chief thing to be regarded in the construction of any grant of power contained in the Constitution; but the claim that they, in conferring on the President the power "to grant pardons," did not intend to give him the power to grant amnesty is in clear and manifest conflict with the proceedings and debates of the Convention, as well as with the exposition of this article published in the *Federalist* while the Constitution was pending before the state conventions for ratification. From the proceedings and debates of the Convention and this contemporary exposition of this article, it is so clear as to be unquestionable that the framers of the Constitution not only intended to invest

the President with power to grant amnesty for offences against the United States, but understood that this power to grant amnesty was included in the power "to grant pardons."

The "Shays Rebellion" in Massachusetts occurred in the year next preceding the session of the Convention of 1787. Governor Bowdoin was then the chief magistrate of that Commonwealth, and by his wise and vigorous policy the rebellion was completely suppressed. At the annual state election in the spring of 1787, he was a candidate for re-election, but was defeated by Governor Hancock, who received the support of the Shays party, and of all who sympathized with them; and the result of the election was in fact a triumph of that party: 1 Holland's History of Western Massachusetts, p. 288. By the Constitution of Massachusetts of 1780, chap. 2, § 1, art. 8, the power of pardoning offences against the Commonwealth, except in cases of impeachment, was vested in the Governor, acting by and with the advice of the Executive Council, subject to this limitation, viz.: "But no charter of pardon granted by the Governor, with advice of the Council, before conviction, shall avail the party pleading the same, notwithstanding any general or particular expressions contained therein descriptive of the offence or offences intended to be pardoned."

This provision of the Constitution by which the executive power of pardoning is restricted still remains in force. As the governor and council could not pardon any offences until *after conviction*, they of course had no power to grant a general pardon or amnesty applicable to those who had been engaged in the rebellion.

These facts become peculiarly significant in view of the reference which was made to the Shays Rebellion, in the Convention of 1787, by Mr. Rufus King (who was then one of the delegates to that Convention from Massachusetts, and afterwards a distinguished Senator from New York), and by Mr. Madison and Col. George Mason in the Virginia State Convention, as well as in view of the remarks in the 74th number of the Federalist on the power given by the Constitution to the President "to grant pardons," as hereinafter mentioned.

In Mr. Madison's "Debates of the Federal Convention held in 1787," published in the volume supplementary to "Elliott's Debates," and usually referred to as the 5th volume of "Elliott's

Debates," there is a full account of the proceedings and debates in the Convention, so far as the article conferring the power to grant pardons was specially the subject of consideration; and this account is contained in the following extracts, viz. :—

*"In Convention. Saturday, August 25th, 1787.—P. 480.*

*"Mr. Sherman* moved to amend the "power to grant reprieves and pardons" so as to read "to grant reprieves until the ensuing session of the Senate, and pardons with consent of the Senate."

Connecticut, aye, 1. New Hampshire, Massachusetts, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, no, 8.

The words "except in cases of impeachment" were inserted *nem. con.* after "pardons."

*Monday, August 27th, 1787.—P. 480.*

Article 2, Sect. 2, being resumed,—

*Mr. L. Martin* moved to insert the words "after conviction" after the words "reprieves and pardons."

*Mr. Wilson* objected, that pardon before conviction might be necessary, in order to obtain the testimony of accomplices. He stated the case of forgeries, in which this might particularly happen.

*Mr. L. Martin* withdrew his motion.

*Saturday, September 15th, 1787.—P. 549.*

"Article 2, Sect. 2.

"He shall have power to grant reprieves and pardons for offences against the United States," &c.

*Mr. Randolph* moved to except "cases of treason." The prerogative of pardon in these cases was too great a trust. The President may himself be guilty. The traitors may be his own instruments.

*Col. Mason* supported the motion.

*Mr. Gouverneur Morris* had rather there should be no pardon for treason than let the power devolve on the legislature.

*Mr. Wilson.*—Pardon is necessary for cases of treason, and is best placed in the hands of the executive. If he be himself a party to the guilt, he can be impeached and prosecuted.

*Mr. King* thought it would be inconsistent with the constitutional separation of the executive and legislative powers, to let the prerogative be exercised by the latter. A legislative body is wholly unfit for the purpose. They are governed too much by the passions of the moment. In Massachusetts, one Assembly would have hung all the insurgents in that state: the next was equally disposed to pardon them all. He suggested the expedient of requiring the concurrence of the Senate in acts of pardon.

*Mr. Madison* admitted the force of objections to the legislature, but the pardon of treasons was so peculiarly improper for the President, that he should acquiesce in the transfer of it to the former rather than leave it altogether in the hands of the latter. He would prefer to either an association of the Senate, as a council of advice, with the President.

*Mr. Randolph* could not admit the Senate into a share of the power. The great danger to liberty lay in a combination between the President and that body.

*Col. Mason*.—The Senate has already too much power. There can be no danger of too much lenity in legislative pardons, as the Senate must concur; and the President moreover can require two-thirds of both houses.

On the motion of *Mr. Randolph*:—Virginia, Georgia, aye, 2; New Hampshire, Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, North Carolina, South Carolina, no, 8. Connecticut divided."

In the objections of George Mason to the Constitution, as adopted by the Convention, in which he assigns his reasons for not signing the same (*Elliott's Debates*, vol. 1, p. 494), he says:—"The President of the United States has the *unrestrained* power of granting pardon for treason; which may be sometimes exercised to screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt." The subject of the President's power to grant pardon under the Constitution does not appear to have been the subject of consideration or allusion in any state convention except that of Virginia. In the state convention of Virginia, both *Col. Mason* and *Mr. Madison* were members, as they had also been members of the Federal Convention which framed the Constitution; and in the Virginia convention *Col. Mason* repeated his objections to the Constitution, and the following debate thereupon occurred (see *Elliott's Debates*, vol. 3, p. 497), viz.:—

"*Mr. Madison*, advertng to *Mr. Mason's* objections to the President's power of pardoning, said it would be extremely improper to vest it in the House of Representatives, and not much less so to place it in the Senate; because numerous bodies were actuated more or less by passion, and might, in the moment of vengeance, forget humanity. It was an established practice in Massachusetts for the legislature to determine in such cases. It was found," says he, "that two different sessions, before each of which the question came with respect to pardoning the delinquents of the rebellion, were governed precisely by different sentiments: the one would execute with universal vengeance, and the other would extend general mercy. \* \* \*

*Mr. Mason* vindicated the conduct of the Assemblies mentioned by the gentleman last up. He insisted they were both right; for, in the first instance, when such ideas of severity prevailed, a rebellion was in existence. In such circumstance, it was right to be rigid. But after it was over, it would be wrong to exercise unnecessary severity.

*Mr. Madison* replied that the honorable member had misunderstood the fact; for the first Assembly was after the rebellion was over. The decision must have been improper in the one or the other case. 'It marks this im-

portant truth,' says he, 'that numerous bodies of men are improper to exercise this power. The universal experience of mankind proves it.'"

The above extracts show that all who participated in the debates on this subject, alike understood (however widely they differed in opinion in other respects) that this article conferring the power "to grant pardons," included the power to grant a general pardon or amnesty in cases of treason; and, in view of the reference to the general pardon or amnesty which was granted in the case of the Shays Rebellion, it is a "clear conclusion" that the framers of the Constitution intended to place this power to grant a general pardon in cases of treason in the hands of the President alone, and not to allow to the legislative branch of the government any share in the exercise of it. This conclusion is impregnably fortified by the contemporary construction of the power "to grant pardons," which was given by the friends of the Constitution while that instrument was pending before the state conventions for ratification.

The only reference made in the Federalist to the subject of the President's power "to grant pardon," is contained in the following extract from its 74th number (No. 73 in Dawson's edition), which was written by Hamilton, viz. :—

"The expediency of vesting the power of pardoning in the President has, if I mistake not, been only contested in relation to the crime of treason. *This, it has been urged, ought to have depended upon the assent of one or both of the branches of the legislative body.*

I shall not deny that there are strong reasons to be assigned for requiring in this particular the concurrence of that body or of a part of it. As treason is a crime levelled at the immediate being of the society, when the laws have once ascertained the guilt of the offender, there seems a fitness in referring the expediency of an act of mercy towards him to the judgment of the legislature. And this ought the rather to be the case, as the supposition of the connivance of the chief magistrate ought not to be entirely excluded.

*But there are also strong objections to such a plan.* It is not to be doubted that a single man of prudence and good sense is better fitted, in delicate conjunctures, to balance the motives which may plead for and against the remission of the punishment, than any numerous body whatever. *It deserves particular attention, that treason will often be connected with seditions which embrace a large proportion of the community; as lately happened in Massachusetts.* In every such case, we might expect to see the representation of the people tainted with the same spirit which had given birth to the offence. And when parties were pretty equally matched, the secret sympathy of the friends and favorers of the condemned person, availing

itself of the good nature and weakness of others, might frequently bestow impunity where the terror of an example was necessary. On the other hand, when the sedition had proceeded from causes which had inflamed the resentments of the major party, they might often be found obstinate and inexorable, when policy demanded a conduct of forbearance and clemency.

*But the principal argument for reposing the power of pardoning in this case in the chief magistrate is this: in seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the Commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall. The dilatory process of convening the legislature, or one of its branches, for the purpose of obtaining its sanction to the measure, would frequently be the occasion of letting slip the golden opportunity. The loss of a week, a day, an hour, may sometimes be fatal. If it should be observed that a discretionary power, with a view to such contingencies, might occasionally be conferred upon the President, it may be answered in the first place, that it is questionable whether, in a limited constitution, that power could be delegated by law; and in the second place, that it would generally be impolitic beforehand to take any step which might hold out the prospect of impunity. A proceeding of this kind, out of the usual course, would be likely to be construed into an argument of timidity or of weakness, and would have a tendency to embolden guilt."*

There are three precedents or instances in our history of the grant by the President of a general pardon by proclamation, without the authority or assent of Congress, each occurring when the men who framed the Constitution were actors in public life. In neither case was the propriety of this exercise of the pardoning power challenged or questioned.

The *first* of these instances was in the case of the insurrection in the western counties in Pennsylvania in 1794, obstructing the execution of the acts for raising a revenue on distilled spirits and stills, known as the "Whiskey Insurrection." By his proclamation, dated July 10th 1795, President Washington granted "a full, free, and entire pardon to all persons (excepting as hereinafter excepted), of all treasons, misprisions of treason, and other indictable offences against the United States, committed within the fourth survey of Pennsylvania before the said 22d day of August last past, excepting and excluding therefrom, nevertheless, every person who refused or neglected to give and subscribe the said assurances" [of submission to the laws of the United States, which were required as terms for the pardon, as mentioned in the preamble or recital of the proclamation], "in the manner aforesaid (or having subscribed, hath violated the same), and now standeth

indicted or convicted of any treason, misprision of treason, or other offence against the United States; hereby remitting and releasing unto all persons, except as before excepted, all penalties incurred or supposed to be incurred for, or on account of, the premises." This proclamation may be found published at length in Sparks' Writings of Washington, vol. 12, p. 134.

The *second* instance of the grant of a general pardon by the President was in the case of the insurrection in the counties of Northampton, Montgomery, and Bucks, in Pennsylvania in 1798, to prevent the execution of the law directing the valuation of houses and lands and the enumeration of slaves, and levying taxes on the same, which is known as the "House Tax Insurrection." Three persons in that particular district of country, Fries, Heyney, and Getman, were convicted of treason, committed in obstructing the execution of this law, and sentence of death was passed upon them. In the cabinet of President John Adams, Attorney-General Lee (who was also acting as Secretary of State *pro tempore*), and Stoddert, Secretary of the Navy, recommended that Fries only should be left for execution. Wolcott, Secretary of the Treasury, recommended that *all three* should be executed. Lee and Stoddert expressed their opinion that it would be more just and wise that *all* should suffer the sentence of the law than that *all* should be pardoned. See their letters to the President, dated 20th May 1800, in the Life and Works of John Adams, vol. 9, pp. 59-60.

The President, "taking on himself the responsibility of one more appeal to the humane and generous natures of the American people," directed a pardon to be issued to *all three*, and also directed Secretary Lee to prepare "a proclamation of a general pardon of all treasons and conspiracies to commit treasons, heretofore committed in the three offending counties, in opposition to the law laying taxes on houses, &c., that tranquillity may be restored to the minds of those people, if possible." See his letter to Lee, Secretary of State, *pro tempore*, dated 21st May 1800: Id., same vol., p. 60. This proclamation of a general pardon was dated and issued on the 21st May 1800, and is published at length in the same volume last referred to, p. 178. It grants a full pardon to all persons who had been engaged in the insurrection, and remits and releases unto all such persons all pains and penalties incurred or supposed to be incurred for or on account of the premises, in terms as ample as those used in the proclamation of



President Washington in the case of the Whiskey Insurrection, before referred to.

In his letter X., to the printers of the Boston Patriot, President Adams, referring to his course in this matter, says:—"In all great and essential measures, he (the President) is bound by his honor and his conscience, by his oath to the Constitution, as well as his responsibility to the public opinion of the nation, to act his own mature and unbiassed judgment, though unfortunately it may be in direct contradiction to the advice of all his ministers. This was my situation in more than one instance. It had been so in the nomination of Mr. Gerry; it was afterwards so in the pardon of Fries; two measures that I recollect with infinite satisfaction, and which will console me in my last hour." He also, in another reference to the same matter, in a letter to James Lloyd, dated 31st March 1815 (Id., vol. 10, pp. 152-154), says that "his judgment was clear that their crime" (referring to Fries, Heyney, and Getman) "did not amount to treason. They had been guilty of a high-handed riot and rescue, attended with circumstances hot, rash, violent, and dangerous, but all these did not amount to treason. And I thought the officers of the law had been injudicious in indicting them for any crime higher than riot, aggravated by rescue."

The *third* instance of a grant of a general pardon by the President was in the case of the proclamation of President Madison, dated February 16th 1815, concerning certain foreigners and citizens, known as "the Barataria pirates," who had co-operated in forming a large establishment at an island in Lake Barataria, near the mouth of the river Mississippi, for the purpose of a clandestine and lawless trade, in violation of the non-intercourse act, during the last war with England. The government of the United States had caused this establishment to be broken up, and proceeded to prosecute the offenders by indictment. For reasons set forth in his proclamation, President Madison granted to the offenders a full pardon of all offences against the laws touching the intercourse and commerce of the United States with foreign nations, and directed all suits, indictments, and prosecutions for fines, penalties, forfeitures, &c., to be discontinued and released. This proclamation bears date two days before the date of the proclamation of the treaty of peace with England, known as the treaty of Ghent, and was issued while Congress was in session.

It is admitted in the report of the Senate Judiciary Committee that these proclamations of Presidents Washington, John Adams, and Madison "purport to grant general pardon and remission of penalties," but it is claimed that "*they do not purport to grant amnesty or any restoration of lost rights,*" as the recent proclamation of President Johnson does. Unless all recognised definitions are ignored and set at defiance, *amnesty* is the distinguishing feature and element in every act of general pardon; and where such a pardon is full and without exception or qualification, it is, *proprio vigore*, a complete and perfect *amnesty*.

It is certain that President Washington understood that his proclamation granted *amnesty*, and that he did not comprehend or understand the distinction attempted to be made in this report between *amnesty* and *pardon*. In his "speech" to both Houses of Congress on 19th November 1794—(there were no "*Messages*" from the President to Congress at the commencement of its annual sessions until President Jefferson's time)—in referring to the insurrection in the western counties of Pennsylvania, known as the Whiskey Insurrection, he speaks of his appointment of commissioners to confer with citizens in the insurgent district, and says that "*pardon* was tendered to them [the insurgents] by the Government of the United States and that of Pennsylvania, upon no other condition than a satisfactory assurance of obedience to the laws." In a subsequent reference in the same "speech" to this tender of *pardon* to the insurgents, he speaks of it as "the proffered terms of *amnesty*," being apparently unsuspecting that it would ever be claimed that *amnesty* and *pardon* are words which "are not synonyms or equivalents," or that these words "import, as they always have done, widely different things." Sparks' Writings of Washington, vol. 12, pp. 47, 48.

In respect to the statement that the proclamations of a general pardon by Presidents Washington, John Adams, and Madison do not purport to grant "any *restoration* of lost rights as the one in question does" (referring to the recent proclamation of President Johnson), it may be observed that no rights can be considered as forfeited or "lost" until a conviction and judgment in due course of law, and that the effect of a pardon, when it is full and complete, is to remove every disability incident to the conviction and judgment, and to restore every right forfeited or lost by the con-

viction and judgment—the only limitation to its operation being that it does not restore offices forfeited, or property or interests vested in others, in consequence of the conviction and judgment.

The same form of expression, in respect to “the restoration of all rights of property,” is contained in President Lincoln’s proclamation of amnesty dated 8th December 1863, as hereinafter quoted. No act of amnesty could be *complete* without a restoration of rights lost or forfeited by the offender or offenders; and, if not expressed, it is necessarily implied in every such act that the offence and all of its incidents and consequences shall be blotted out “and put in utter oblivion.” A necessary incident of an act cannot be regarded as being either objectionable or unauthorized, because it is expressed in the act instead of being left to be implied from it. But the objection which is made to the expression in the proclamation in respect to the “restoration of lost rights” does not touch the question whether the Constitution gives to the President or to Congress the power to grant a general amnesty or pardon; and this expression may be stricken from the proclamation without impairing its effect as an act of full, complete, and unconditional amnesty or pardon. So far as the proclamation is authorized by the Constitution, the courts will give effect to it as a legal and valid act; while so far as it assumes to do anything which is not within the constitutional prerogative of the President, it will, to that extent, and to that extent *only*, be treated as being illegal and void.

A reference is made in the report of the Senate Judiciary Committee to the 13th section of the Act of Congress of July 17th 1862, purporting to confer upon the President power to grant “pardon and amnesty in certain cases, which is now repealed as before mentioned; and it is stated that it was “under this plenary and sufficient authority of Congress that the proclamations of both Mr. Lincoln and the present Executive [Johnson], except the last one [three?] referred to in the message [the President’s message to the Senate of 18th January 1869] were made.”

It is true that this 13th section of the Act of July 17th 1862 was on the statute-book unrepealed when President Lincoln issued his proclamation of general pardon dated December 8th 1863; but if by this statement the idea is intended to be conveyed that he understood or regarded his authority to issue that

proclamation as derived, not from the constitutional provision investing the President with power "to grant pardons," but from the 13th section of the Act of July 17th 1862, above referred to, it is without any warrant, and conveys an impression which is in apparent conflict with the fact.

That proclamation is published at length in the Appendix to the 13th volume of the United States Statutes at Large. It commences with a recital of the provision of the Constitution giving the President "power to grant reprieves and pardons for offences against the United States except in cases of impeachment," and then recites the provisions of the 13th section of the Act of 17th July 1862, and then adds, with a *naïveté* which is remarkable as well as characteristic: "and whereas the Congressional declaration for limited and conditional pardon accords with the well-established judicial exposition of the pardoning power," &c. It grants "a full pardon," on certain conditions and with certain exceptions, "to all persons who have directly or by implication participated in the existing rebellion,"—"with the restoration of all their rights of property except as to slaves, and in property cases where the rights of third parties shall have intervened,"—and does not even once use the word *amnesty* except as it is contained in the recital of the 13th section of the Act of July 17th 1862. If the power to issue this proclamation was derived from the Act of Congress, and not from the pardoning power vested in the President by the Constitution, why did President Lincoln commence the proclamation with a recital of the provision of the Constitution in respect to the pardoning power, or make any reference whatever to it? and why did he refer to this 13th section of the Act of July 17th 1862 as a "Congressional *declaration* for limited and conditional *pardon*," and speak of it as being in "accord with the well-established judicial exposition of the *pardoning* power?"

On the day after this proclamation was issued (9th December 1863), he transmitted his annual message to the two Houses of Congress; and, in that message, he refers to this proclamation, and says that "the *Constitution* authorizes the *Executive* to grant or withhold the pardon at his own *absolute* discretion, and this includes the power to grant on terms, as is fully established by judicial and other authorities," and again, in the same message, he says that it is believed that the *Executive* may lawfully claim

the performance of the condition required in the proclamation "in return for pardon and the restoration of forfeited rights, which he has clear *constitutional* power to withhold altogether, or grant upon the terms he shall deem wisest for the public interest." While thus referring *ex industria* to the authority vested in him by the Constitution for the exercise of the power of pardon in the manner in which it was exercised by his proclamation, he makes no allusion whatever in his message to "the congressional *declaration*;" and it would seem very clear that he regarded his power to issue that proclamation as resting solely on the authority of the provision of the Constitution which invested him with the pardoning power, and not at all on "the congressional *declaration*," or on any delegated *legislative* authority whatever.

The proclamation of President Johnson, dated May 29th 1865, which was issued before the 13th section of the Act of July 17th 1862 was repealed, makes no reference whatever to that section.

It cannot be questioned that all the effects of an amnesty may legitimately result from other acts than the President's proclamation of a general pardon, as, for example, an amnesty may result from the provisions of a treaty of peace, or from the operation of the Statute of Limitations, or from a repeal of the laws defining the offence and prescribing its punishment. But this result from the exercise of unquestioned constitutional powers cannot be considered as interfering with or derogating from the exclusive pardoning power which is vested in the President by the Constitution.

Under the Constitution the power to grant a general pardon or amnesty is either a purely presidential prerogative, or else it is a legislative power. If it is a legislative power it can only be exercised by or under an Act of Congress, and must be subject to be regulated thereby; and, by a two-thirds vote in each House, it may be exercised in defiance of any objection by the President. By the Constitution (Art. 1, Sect. 1), it is provided that "all legislative powers *herein granted* shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives;" and Congress can exercise no other powers than such as are "granted" to it in the Constitution. The powers thus "granted" are such as are in terms expressly conferred on Congress in the Constitution, and such implied powers "as shall

be necessary and proper for carrying into execution" the powers expressly mentioned as granted to Congress, "and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof:" Art. 1, Sect. 8. All of the legislative powers which are "granted" or recognised in the Constitution are included within these limits. There is not only no express grant to Congress of power over the subject of a general pardon or amnesty, but no such power can rightfully be derived by implication as being necessary to carry into execution any power expressly granted by the Constitution; and the proceedings and debates of the Federal Convention of 1787 conclusively show that the framers of the Constitution intended that Congress should not be invested with this power.

No fancied analogy from the powers or prerogatives of Parliament can be regarded as lending any assistance to the claim that this power is a legislative power and is vested in Congress; because the power of Parliament is unlimited and sovereign, while Congress can exercise only limited or expressly granted legislative power. Parliament may pass a bill of attainder, or an *ex post facto* law, but under our Constitution this cannot be done by Congress or by any state. No Act of Parliament can be unconstitutional—an Act of Congress may be. The "clear conclusion" would seem to be that the power to grant a general pardon or amnesty for offences against the United States is an executive and not a legislative power, and that it cannot be created, exercised, or controlled by any Act of Congress. This conclusion is in entire harmony with all of the judicial expositions of the nature or limits of the pardoning power conferred on the President by the Constitution, as well as with the avowed purpose of the framers of that instrument; and the power to grant pardon to a whole class of offenders is surely no higher in degree than the unquestioned executive power to grant pardon to every individual in that class.

L. C. K.

## RECENT AMERICAN DECISIONS.

*Court of Appeals of Maryland.*HINKLEY, EXECUTOR OF JARVIS AND OTHERS, v. WHEELWRIGHT.  
ADMINISTRATOR C. T. A. OF WYETH.<sup>1</sup>

In equity a conveyance, whatever form it may assume, will be treated as a mortgage, whenever it appears to have been taken as a security for an existing debt, or a contemporaneous loan.

But on the other hand, parties capable of acting may make conditional contracts for sale of their property, and a vendor may make an absolute conveyance, subject to an agreement for a reconveyance, upon the repayment of the purchase-money, on or before a fixed day.

Nor does the fact that parties stand in the relation of mortgagor and mortgagee prevent their dealing with each other as vendor and purchaser of the equity of redemption, if the mortgagee does not make use of his encumbrance to influence the mortgagor to part with his property at less than its value.

The intention of the parties is, in such cases, what the courts seek to discover and enforce.

As between grantor and grantee, where it appears that a conditional sale was a mere cloak to an irredeemable mortgage, equity will let in the grantor to redeem: but it is a matter of grave doubt, whether, under such circumstances, it will afford the grantee a remedy for the debt against the grantor.

*I. N. Steele and Edward O. Hinkley, for appellant.*

*Geo. Wm. Brown and Arthur Geo. Brown, for appellee.*

The opinion of the court was delivered by

MILLER, J.—The conclusion at which we have arrived upon the main point in controversy in this case, renders unnecessary a determination of other questions of importance discussed at bar.

Upon the best consideration we have been able to give to the subject, the court is of opinion that the absolute deed of the "Assabet Estate" from Nat. J. Wyeth to Leonard Jarvis, of the 17th of August 1852, cannot at the instance of the appellants be treated in equity as a mortgage by reason of any of the papers executed at the same time. Nor can we discover that it was the intention of the parties that such should be its effect and operation from any circumstances, disclosed by the record, preceding and accompanying its execution.

There is no doubt that in equity a conveyance, whatever form

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<sup>1</sup> We are indebted for the opinion in this case to the Baltimore Law Transcript.  
EDS. AM. L. R.

it may assume, will be treated as a mortgage whenever it appears to have been taken as a security for an existing debt or a contemporaneous loan, and that the inclination of the courts is, in doubtful cases, so to treat it and allow the grantor to redeem. But on the other hand, there is no principle of law or equity which forbids parties capable of acting for themselves from making conditional contracts for the sale of their property, real or personal, or which forbids a vendor to make an absolute conveyance of the property sold subject to an agreement that he shall be entitled to a reconveyance upon the repayment of the purchase-money or any other sum certain, on or before a fixed day, or to make any other stipulations by which the conveyance shall become void or remain absolute. Such contracts are not prohibited either by the letter or the policy of the law, and to deny the right to make them would, as was said by Chief Justice MARSHALL in *Conway's Executors v. Alexander*, 7 Cranch 237, be "to transfer to the Court of Chancery in a considerable degree the guardianship of adults as well as minors." Nor does the fact that parties stand in the relation of mortgagor and mortgagee prevent their dealing with each other as vendor and purchaser of the equity of redemption. Such transactions will not be set aside unless for manifest unfairness or inadequacy of consideration. A mortgagee may become the purchaser of the equity of redemption if he does not make use of his encumbrance to influence the mortgagor to part with his property at less than its value: 5 G. & J. 85.

The intention of the parties is, in such cases, what the courts seek to discover and enforce, and to establish this, evidence *dehors* the instrument, of the circumstances under which it was given or the object it was designed to fulfil, is admitted. "In cases of this kind," as was well said by Chancellor BLAND, in 5 G. & J. 82, "everything depends upon what shall be deemed the intention of the parties. Where there are several distinct instruments of writing they must all be taken together and the contract deduced from a fair construction of the whole; and evidence *dehors* the writings may be let in, not as a means of explaining or construing them, but to show what was the real and true character of the whole contract; and if it appears to have been intended only as a mortgage security, the right of redemption will not be allowed to be fettered by any conditions disadvantageous to the mortgagor." If, on the other hand, it is shown to be an absolute sale, it will



not be converted into a mortgage merely because of a stipulation to reconvey on the repayment of the purchase-money within a certain time.

In this case both parties to the deed are dead, and we have only the written instruments themselves and part of a correspondence preceding the execution of the deed from which to gather their intentions. Before examining these it is proper to observe that this is not a case in which the grantor is seeking to redeem, and, therefore, insisting the deed is a mortgage, but the executor and some of the residuary devisees and legatees of the grantee, are here asking the court to treat it as a mortgage in order to fix upon the grantor a personal liability for the debt secured by the mortgage, and they seek to do this for the purpose of having this debt set off against the share of the grantor in the estate of the grantee, he being himself one of the residuary legatees and devisees under the will of the latter.

As between grantor and grantee, where it appears that a conditional sale was a mere cloak to an irredeemable mortgage, equity will let in the grantor to redeem; but it is matter of grave doubt, whether under such circumstances it will afford the grantee a remedy for the debt against the grantor because no inconvenience can result to a creditor, unless the security is inadequate to the payment of the debt, for he may call on the debtor to make payment at once, or submit to a sale or foreclosure of the mortgaged premises; and even in those cases where he eventually proves a loser, he has no right to complain of a difficulty growing out of his own wrongful act in making the form of the transaction different from the reality: *White & Tudor's Lead Cases in Equity* in 72 Law Lib. 483.

Let us now examine the circumstances attending this transaction, as well as the written instruments themselves, for the purpose of ascertaining whether the deed is, in this case, to be treated as a mortgage.

Jarvis gave to his nephew, Nathaniel J. Wyeth, of Cambridge, Massachusetts, a letter of credit on Peabody, of London, for £6000, and at the same time took from the firm of Wyeth, Rogers & Co., of New York, who were interested in the business of N. J. Wyeth, and of which Leonard J. Wyeth was a member, an engagement to guarantee him against loss to the extent of £3000. He also at the same time took a mortgage from N. J.

Wyeth on several parcels of property in Cambridge and Sudbury, Massachusetts, then valued by Wyeth at \$130,000 or \$140,000, free of prior encumbrances, as security for all sums of money now due or that may hereafter become due and owing from Wyeth to him, and especially and in the first place to indemnify and save him harmless from all liability by reason of this letter of credit. Amongst the property conveyed by the mortgage was the Assabet estate, consisting of an ice establishment in Sudbury. Besides the liability on account of the letter of credit, Wyeth was also indebted to Jarvis to the extent of some \$2000 or \$3000. These papers, the letter of credit, the guarantee, and the mortgage all bear date the 20th of August 1851.

Wyeth expressed a strong desire the mortgage should not be recorded at present, but said it might be recorded if Jarvis desired it. It was placed on record on the 4th of February 1852, and on the 2d of March, Wyeth writes, complaining of this and saying it would prevent him from borrowing money on the large surplus of his estate; that by a prior letter (which does not appear on the record) he had offered to Leonard J. Wyeth and Jarvis, ample security for the letter of credit, in which their interest was equal, and said if Jarvis would accept this it would release his other property. By letter of the 4th of March, Jarvis in reply says: "I have no wish to take any advantage I may have in being first on record, provided you and Leonard pay up the letter of credit, or one-half of it. I will pay the other half, you to give me satisfactory security for this half and for the note I hold of yours for about \$2800 or \$2900—say for about \$18,000 in all, and provided such a change of security can now be made legally and securely. I don't wish to keep you away from your resources more than is consistent with my safety. Security, ample and good, I must have if any change is made. If I can accommodate you in this way I shall be happy to do it; but I fear your six months' law which you have brought to our notice will be an effectual barrier to any such change of security at this time."

The security thus offered by Wyeth was evidently the Assabet property, for on the 30th of July Wyeth again writes to Jarvis, saying: "you have employed some one to fix the value of the Assabet property. I do not know what the result of your inquiries has been;" and he then encloses to Jarvis two letters

from parties valuing the property, and states that it cost him over \$27,000, and then adds: "I ask your early attention to this matter, for many are implicated in it; if you could write Leonard that you will be satisfied with this property for your security, it may relieve me at once." One of the enclosed letters from F. Tudor says he has seen the Assabet establishment, that the value of such property depends on the continued prosperity of the ice trade; that it cannot be worth less than cost; and as Wyeth says that it cost \$25,000, he would think it worth that sum; the other letter says it would then rent for \$2500 or \$3000.

No other correspondence appears, and we know nothing of the further negotiation between the parties, which resulted in the contract evidenced by the instruments executed on the 17th of August 1852. These instruments are:

1st. An absolute deed from Wyeth and wife, conveying to Jarvis in fee the Assabet property for the consideration of \$15,000.

2d. A lease from Jarvis to Wyeth of the same property for the term of three years from the 15th of October following, at the rent of \$900, payable semi-annually, the lessee covenanting to pay the rent, to keep the premises insured, to deliver up possession at the end of the term, to pay taxes levied during the term, and also to pay the rents and taxes for such further time as the lessee may hold the same, and not to suffer waste, &c.

3d. An agreement or indenture, as it is called, between Wyeth and Jarvis, which recites the conveyance in fee to Jarvis of the Assabet property, one of the estates heretofore conveyed to Jarvis by the mortgage of the 20th of August 1851, and the lease thereof to Wyeth for the term of three years, and then sets forth "that said conveyance and demise are made upon the following terms and conditions," to wit:

First. If Wyeth shall perform the covenants in the lease, then Jarvis "agrees at any time within the term of three years above specified, upon payment to him of the sum of \$15,000, to convey unto the said Wyeth, his heirs and assigns," the said Assabet estate, "and the said Jarvis further agrees that upon such payment to him of the sum of \$15,000, or other satisfaction for that amount, either by a sale of said estate as hereinafter provided, or by a good and absolute title to the same, being vested in said Jarvis, he will release and discharge the said Assabet estate from all his

claims upon the same retained by him under the mortgage above referred to."

Second. Upon Wyeth's failure to perform the covenants of the lease, or if the \$15,000 shall not be paid to Jarvis, for said estate, by Wyeth, his heirs, executors, &c., at or within said term of three years, then Jarvis shall have the right to sell the estate at public auction, and if such sale be made within six years from the date hereof, it shall be on the premises, with notice, &c., and upon any conveyance of the estate by virtue of this agreement, the said Jarvis may make and deliver to any purchaser thereof, a deed or deeds in confirmation, release, or warranty of the same in the name of Wyeth, as his attorney for that purpose by presents appointed; and out of the money arising from the sale Jarvis agrees, after retaining the sum of \$15,000, with costs of sale, to render the overplus, if any, together with a true and particular account of the sale, to Wyeth, his heirs, &c. "And it is further agreed that any sale of said estate made by said Jarvis, after said period of six years, shall be a perpetual bar against all claims by said Wyeth, his heirs or assigns, without any notice being given or account rendered to him of the same."

4th. An assignment from Jarvis to Leonard J. Wyeth for the consideration of \$17,315 of all his interest in the mortgage of the 20th of August 1851, and of the debt thereby secured, and the estate thereby conveyed, except the Assabet property, "as to which estate my interest in the said mortgage is to continue as security for the sum of \$15,000;" and the residue of the mortgage, and the estate thereby conveyed, the said Leonard is to hold as security for the sum of \$17,315, the consideration above expressed.

To this assignment is appended an agreement by Nathaniel J. Wyeth, dated the 18th of September 1852, by which he assents to and ratifies and confirms "the above assignment, and the separation and apportionment thereby made of the estate conveyed, and the debts secured by said mortgage."

5th. An agreement between Jarvis and Leonard J. Wyeth, which recites the deed in fee of the Assabet estate included in the mortgage, the assignment of the residue of the mortgage, and the estate thereby conveyed to Leonard, "excepting the said Assabet estate, in which the said Jarvis retains his interest under said mortgage to the extent of \$15,000, for the better protection

of his title to the same;" and then stipulates that Leonard shall pay or discharge on or before the 1st of November following the whole amount due by Jarvis to Peabody on the letter of credit, and give his note to Jarvis at three years for \$2315, to take up Nathaniel J. Wyeth's note to him for that amount, and Jarvis on his part agrees to supply to Leonard, on or before the 15th of October following, the sum of \$15,000, "being the amount of the consideration expressed in the deed" to him for the Assabet estate, and made payable to said Leonard by the written authority and request of the said Nathaniel to said Jarvis hereto annexed.

The annexed authority here referred to is an order by which Nathaniel J. Wyeth, in consideration of the promise and undertaking of the said Leonard expressed in said agreement, directs Jarvis to pay to Leonard, on or before the 15th day of October next, the sum of \$15,000, "being the amount of consideration expressed in my deed of this date to said Jarvis of the Assabet estate in Sudbury."

Subsequently to the execution of these papers, an agreement was endorsed by Jarvis on the lease, modifying it so as to extend to seven years after the 1st of January, 1855, but in all other things to remain as it is now in October 1854; and on the agreement or indenture accompanying the deed is endorsed by Jarvis of date the 13th of November 1854, this agreement: "The lease mentioned in this agreement having been by memorandum on the back of the lease extended to seven years after the 1st of January 1855, the said Leonard Jarvis agrees to extend also the right to redeem the land herein mentioned upon the payment of the sum of \$15,000, at any time within said term of seven years, and not to foreclose within said term."

Looking to the face of the deed, the lease and the accompanying agreement, though the latter is badly drawn, and in some respects almost unintelligible, we think the intention of the parties is very apparent that the property was to be conveyed absolutely to Jarvis, subject to a reconveyance upon payment of \$15,000, within three years, and if the property was sold after that time and within six years, Jarvis was to receive from the sale only the \$15,000 with costs and expenses of the sale, but after that period of six years the deed was to remain indefeasible and absolute. No other construction can in our opinion be placed upon the last condition in the agreement that any sale made by

Jarvis of the property, after said period of six years, shall be a perpetual bar against all claims of Wyeth, his heirs and assigns, without notice given or account rendered. This is what the books call a conditional sale. The right to make such contracts being conceded, we see no limitation that can be placed on the conditions upon which the parties may choose to agree, fixing the contingency upon which the deed is to be void, or to remain absolute, and what objection can there be in so treating this transaction? The fact that the parties previously stood in the relation of mortgagor and mortgagee rather strengthens, than otherwise, the position that this was a conditional sale of the equity of redemption in this particular estate. No inequitable advantage was taken by the mortgagor of the necessities of his nephew; he did not use his encumbrance for the purpose of forcing a hard bargain out of the mortgagor, for though Wyeth speaks of being in difficulties, there is nothing to show his necessities were such or the pressure upon him so imminent as to make him willing to sacrifice his property for the sake of relief. The parties appear to have dealt at arms' length. Jarvis in the first instance took a mortgage according to Wyeth's statement upon \$150,000 worth of property to secure \$30,000, and also a guarantee from other parties for \$15,000 of this sum. He placed his mortgage upon record. Wyeth complains of this locking up of his resources, and wants a change of security, and offers the Assabet estate. Jarvis replies he is willing to make the change provided it can be done legally and securely, but if such change is made he must have ample security.

He then sends some one to fix the value of the proffered estate. Wyeth, hearing of this, places his own estimate upon it, and gets certificates from others, of its value. Jarvis then goes to Massachusetts, for it appears he was there when the papers of the 17th of August were executed. These papers are the consummation of the negotiations and the embodiment of the final contract between the parties, and from them, it clearly appears, in our judgment, that Wyeth sold and Jarvis purchased the Assabet property, upon the terms and conditions expressed in the agreement accompanying the deed. The motive for this on the part of Wyeth, was to relieve the residue of his property from the incubus of the mortgage in the hands of Jarvis, who had manifested a determination to hold on to the whole and to place it in the hands of Leonard J. Wyeth with whom he was engaged in business, and where he

could more readily use it for business purposes, and on the part of Jarvis to permit his nephew access to his resources so far as he could do it with perfect safety to himself. We have no doubt the first proposal from Wyeth contemplated a continuance of the mortgage upon the Assabet property alone, as security for the debt, but we are well satisfied this proposal was not accepted by Jarvis. He did not trust to Wyeth's representation of its value, for if he did, we cannot see why, in view of the kindly disposition manifested in his letter of the 4th of March, he should not have consented to remain mortgagee of property worth \$27,000 or \$30,000 to secure \$15,000 of debt or liability, and have simply released the residue of the mortgaged estates or transferred his interest in them to Leonard J. Wyeth. We cannot perceive the necessity of formally executing all these papers if the design of the parties was that the relation of mortgagor and mortgagee was thereafter to continue between them as to this property.

The reference to the mortgage, and the use of the words "security," "redeem," and "foreclose," which appear in the antecedent correspondence and in the papers themselves, are strongly relied on by the appellant's counsel as evidencing an intention of the parties that these instruments were to operate simply as a mortgage for the security of the debt. Such, it is true, are the phrases usually employed when mortgages and instruments intended as security merely are spoken of. But in these deeds and papers of the 17th of August, we find no such use of them as will warrant us in concluding such was the intention of the parties in face of the plain purport of the instruments themselves, and the express and unequivocal language used in other parts of them. The reference to the mortgage and the retention of his interest thereunder by Jarvis as to the Assabet estate, of which he was then taking an absolute deed, was made and done as one of the papers state "for the better protection of his title" to the property. The letter of Wyeth of the 2d of March had disclosed to him the fact that there were unrecorded mortgages and encumbrances prior in date to his own on this property. By releasing his mortgage and taking a deed with notice of these encumbrances they would be let in as against him and any title he might acquire under the deed. To prevent this as well as the operation of intervening encumbrances and claims against the property, Jarvis was careful to retain his interest under the mortgage to protect his

title under the deed. This, we think, satisfactorily explains the reference to the mortgage, and goes far to show the parties intended something more than the mere continuance of the mortgage by this absolute deed and the accompanying papers. The expressions in the agreement of the 13th of November 1854, extending that of August 17th 1852 for seven years, must also, we think, be taken in reference to the agreement to which they refer. When Jarvis thereby agrees to extend the right to redeem the land for seven years, we must infer he meant that Wyeth should have the privilege of repurchase on payment of the \$15,000 as expressed in the agreement, and when he agrees not to foreclose within that time, he must have meant he would not proceed to sell under the agreement before that period.

If the parties had, for the first time, met on the 17th of August 1852, and these instruments had then been executed, and the fact of the pre-existing debt or liability had been shown, there would have been a much stronger case presented for treating the transaction as a mortgage, especially at the instance of the grantor. But such is not the case. The parties were perfectly cognisant of the existing relation between them of mortgagor and mortgagee, and without the use by the mortgagee of the influence of his encumbrance on the one hand, or the pressure of necessity inducing the mortgagor to part with his property for less than its value on the other, they deliberately changed their relations, and contracted for and consummated a sale and purchase of the equity of redemption in part of the mortgaged premises upon the terms and conditions expressed in these papers. We can discover no reason and can find no authority which will compel us to disturb such a transaction, certainly not at the instance of the grantee or his representatives. The parties were capable of so contracting, and the contract must in this case stand as they have made it.

We are strongly fortified in our conclusions both as to law and fact by the case of *Hicks v. Hicks*, 5 G. & J. 75. In that case a mortgage was given to secure an existing debt, and two years afterwards the mortgagee having also in the mean time purchased up an intervening mortgage, took from the mortgagor an absolute deed of the property, and at the same time executed an instrument in writing by which he agreed to reconvey the property to the mortgagor at the end of two years, upon the latter's paying him the sum mentioned in the deed, and in the mean time the



mortgagor was to pay to the mortgagee the sum of \$125 per year.

The grantor failing to pay within the two years, filed his bill after that period to redeem, and insisted the deed should be treated as a mortgage. But both the Chancellor and the Court of Appeals decided the transaction to be a conditional sale of the equity of redemption, and refused relief. The Court of Appeals in that case said the provision in the instrument executed concurrently with the absolute deed, that the grantor was to pay the grantee \$125 per year, constituted the former a tenant of the premises to the latter at a rent of that sum per annum; and that this circumstance, with others, tended to show the transaction was intended as a sale, and not as a security for the repayment of money. In this case, by an express lease, Wyeth was constituted the tenant of Jarvis, and we cannot suppose that if the instrument in *Hicks v. Hicks*, instead of the simple form there used, had assumed the more complex one of a lease, and an agreement containing stipulations and conditions such as are found in the present case, the decision of the Court of Appeals would have been different. Force was also given in that case to the fact that the grantor had said the property was not to pass out of his family, if he could raise the money within two years to pay for it. And this was held to be evidence that the grantor regarded the transaction as a sale, and not as a mortgage. Much stronger circumstances of that character are presented in this case. Wyeth applied for and obtained an extension of the lease and the agreement for seven years, and during his life paid the rent, showing full knowledge and consent on his part to hold the property in the sole capacity of tenant, and under the terms and stipulations of the agreement. He desired an extension of the time of the continuance of that relation, and of the power to repurchase.

Jarvis died in 1855, and Wyeth in 1856, and in the last will of the latter is this clause: "I direct my said executors to carry into effect a bond which I hold against the estate of the late Leonard Jarvis, of Baltimore, dated August 17th 1852, and extended November 13th 1854, concerning the Assabet estate, in Sudbury, if, in their judgment at the time, it will be for the interest of my estate so to do, intending hereby to leave it optional with my said executors to redeem said estate or not, as they shall deem best under all the circumstances then existing,

saving any lease I may have made of the premises." He thus, by the last act of his life, declared in effect that he had no hold upon this estate except by carrying out this bond, and that unless, when the extended time should expire, his executors should think best to redeem it, as the bond had provided, the property would not go to his devisees.

We are aware numerous authorities may be found, both English and American, in which absolute deeds have been treated as mortgages, and the right of redemption upheld. A large number of such cases have been carefully collected by the appellant's counsel in their brief, and presented in argument. Most of the cases upon the same subject will also be found collected and collated in *White & Tudor's Lead. Cases in Equity* in 72 Law Lib. 414 to 447.

We find nothing in those decisions in conflict with the law as announced by Chief Justice MARSHALL, in *Conway's Exec. v. Alexander*, 7 Cranch 218, or overruling the case of *Hicks v. Hicks*, and if any such conflict existed we should follow the decision of our own court and that of the Supreme Court of the United States. The English authorities upon the same subject will also be found to have been carefully examined and fully reviewed by Lord Chancellor COTTENHAM in the case of *Williams v. Owens*, 5 Mylne & Craig 308, where the law is declared to the same effect as stated by Chief Justice MARSHALL.

We have given this case an attentive and careful consideration, and are of opinion the order of the court below should be affirmed. The case, however, is one in which the executor and devisees were warranted in raising the question and in taking this appeal; and the costs of the appeal will be allowed out of the funds in the hands of the executor and trustee.

Order affirmed. Cause remanded.

The general subject covered by this decision is one of great practical interest to a large proportion of business men. It does not appear upon the face of it, to be attended with any serious difficulty; but the circumstances attending such transactions are so infinitely various, that there are very few subjects where the actual administration of the law is attended with greater embarrassment.

It is, indeed, next to impossible, for counsel always to give reliable advice, as to the precise grounds upon which the particular case will be determined by the courts. It would seem there might be, and that there should be, some safe mode of escape from this uncertainty. There is really no difficulty in determining the question, whether in form and in fact a contract is a mortgage, or a

sale with the right of repurchase. The one is no more like the other in form, than a lease for life and for a term of years. But the difficulty arises mainly, we think, from the fact, that sales of real estate, with the right of repurchase, do not seem ordinarily to have any other supposable motive except as the cover for a loan, and a mode of securing its repayment. And in that view it must be regarded as a virtual mortgage. If there is a debt, and a promise of repayment of the agreed price of the land, it is in fact a mortgage—whatever it may be called, or whatever form it may assume. The principal point to which the courts should bring this branch of the law, would seem to be, that every contract of sale and repurchase must be regarded as valid, and as such be enforced, unless there is evidence, either express or resulting from the relation of the parties, or from established rules of construction, that the contract was a mere cloak for a loan, or the security of a debt; or that some unreasonable or unconscionable advantage was taken of the vendor in inducing the sale at a price very much below the actual value. The rule is well stated by WALWORTH, Chancellor, in *Robinson v. Cropsey*, 6 Paige 480; s. c., 2 Edw. Ch. 138. As a general rule, it is here declared, "where there is an application for a loan of money, the court, for the purpose of preventing usury and extortion, will construe an agreement for a sale and repurchase of property to be a mortgage, in case the person to whom the application for the loan is made agrees to receive back his money and interest, or a larger sum, within a specified time, and to reconvey the property, whatever form the writing may be put in, if the real object of the transaction was a loan of money." And the relative value of the property and the agreed price is there said to form an essential indication whether the contract is to be treated as a mortgage or a sale.

But the decision in this case, and the settled law of courts of equity, at the present day, may be regarded as being, that there is nothing in the relation of debtor and creditor, or of mortgagor and mortgagee, which will enable the courts of equity, as matter of law, to declare that contracts for the sale of land, with the right of repurchase for a given period, are not to be upheld between the parties, in the form in which they are made and understood. So, too, the sale of an equity of redemption by the mortgagor to his mortgagee, must be regarded as presumptively fair and obligatory between the parties. In this view of the law, and we think there can be no question in regard to its entire soundness, contracts of sale of real estate with the right of repurchase must be upheld between debtor and creditor, or even between mortgagor and mortgagee, the same as between other parties. But as ordinarily such contracts do not exist unless resorted to for the purpose of covering usury, or where the real transaction is the security of a debt, by the pledge, so to speak, of the estate, it is very justly regarded with suspicion, and slight circumstances will induce courts to treat what is in form a sale, as in fact a mortgage. There can be no question of the justice and necessity of such a rule of construction in order to protect borrowers and debtors generally from unjust pressure. There is no doubt whatever, that in the great majority of cases, any lender of money, or creditor, who obtains security upon real estate, might induce the debtor to stipulate for an absolute foreclosure of his title, upon the failure to meet the obligation promptly on the very day it fell due. And so, in fact, the contract of mortgage reads, and so it must have been upheld by the courts, but for the inequality in the position of the parties. And the same rule extends, in a degree, to many other relations, where the law regards the parties as

standing in unequal relations ; as that of guardian and ward, or trustee and *cestui que trust* of any class.

And it seems to us that it is mainly upon this ground, that the courts of equity have interfered, in declaring contracts of sale of real estate with the right of repurchase to be mortgages. It is true, that if the debt is kept on foot, and the mortgagee or vendee has an election, whether to go against the land or for the debt, the substantial elements of the mortgage still exist or continue. But this class of cases will never bring any embarrassments upon the courts, unless if be in regard to the proofs. The cases of embarrassment under this head are where there is, in form, no debt ; nothing but a bare sale of the land with the right of repurchase. And this must be regarded as entirely valid and binding between the parties, unless there is virtual fraud or oppression. And in the determination of this question, the important consideration will be the relative value of the land, and the agreed price. Where there is any considerable under-price paid, and the parties stood in unequal relations, the courts uniformly interfere and declare the sale a mortgage, and redeemable upon the payment of the price and interest. The purchaser, standing in the relation of creditor, or mortgagee, or guardian, or trustee of any kind, must see to it, if he desires to have the transaction upheld in a court of equity, that he pay the full value of the property. He is, indeed, by his very attitude and reference to the seller, in a position where the law will presume against him. He is bound to show fairness in the sale, instead of calling upon the seller to show unfairness, in order to avoid the sale, as he must do in all other cases. This question is discussed by the chancellor in *Holmes v. Grant*, 8 Paige 243, and by DENIO, V. C., in the same case, in very elaborate

opinions. The subject is also examined in *Hyndman v. Hyndman*, 19 Vt. 9, and in a very large number of cases in the American reports, and in many English cases. *Williams v. Owen*, 5 My. & Cr. 303, is a leading English case.

So, also, in the execution of a power of sale by the mortgagee, although allowed to become the purchaser by the terms of the power ; yet if he fails in the utmost diligence in protecting the rights of the mortgagor, the latter will be allowed to redeem : *Montagu v. Dawes*, 14 Allen 369. This question of the distinction between a mortgage and a conditional sale is extensively and learnedly discussed in a late case in Vermont, *Wing v. Cooper*, 37 Vt. 169, and the present doctrines upon the subject thoroughly and clearly presented.

It seems to be considered that a provision, that if the interest upon a mortgage falls in arrear for a given time, the whole debt shall be treated as due, is entirely valid : *Rubens v. Prindle*, 44 Barb. 336. But where the creditor agreed to remit a portion of his debt on the debtor giving a mortgage for the balance, with a proviso if not paid within two years the whole of the original debt should be recovered, it was held the proviso was a penalty against which equity would relieve, and allow the mortgagor to redeem upon payment of the smaller sum : *Thompson v. Hudson*, Law Rep. 2 Eq. 612.

The principal case seems to maintain the rule for which we contend, that all contracts of sale between mortgagor and mortgagee are to be upheld to the fullest extent, unless there is satisfactory evidence that the vendor acted under duress of circumstances. In the present case, as the application comes from the vendee, he must of course stand upon the contract, and has no ground to demand an equitable interference on his behalf.

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of fact, to be determined upon the master's report and the evidence referred to.

That there was no express contract for the delivery of this property at Medford is conceded.

Was there an implied contract to that effect?

From the master's report and the testimony of Lawrence Brainerd, one of the defendants, which is referred to as a part of said report, it appears that there was a business arrangement entered into between the several roads that constitute a line of communication by railroad from Ogdensburgh, in the state of New York, to Boston, Mass., for the transportation of passengers and freight; that in this chain the Vermont and Canada and the Vermont Central railroads constitute links; that under this arrangement, when a car-load of property was sent from one point upon the line to another, it went to its destination without a change of cars; the amount to be paid for carrying the property through the whole distance was agreed upon and fixed at its place of departure by the parties receiving it. This sum might be paid in gross by the consignor in advance, or by the consignee on its arrival. The freight was not to be paid to the several roads over which the property passed in its transit, but the amount which each was to receive was adjusted between themselves in their monthly settlements. This property was billed through from the place where received to the place to which it was sent, and the way-bill in this case is quite significant of what the practice was, and how the parties understood the transaction. It is as follows: "Merchandise transported by the trustees first mortgage bonds Vt. Central Railroad Co. *from Swanton, Vt., to Medford, Mass., Nov. 14th 1859.*" then is entered the No. of the car and name of its owner, name of the consignee, description of the property, receipt, rate per hundred, and the whole amount of the freight, "*payable at the station sent to.*"

When a party sends a car-load of live-stock over the roads, he is entitled to a free pass over all the intermediate roads on the train, with the car, to its place of destination. Such a pass was given to Morse. These facts, and, in short, without stopping to enumerate further, the great mass of facts and testimony reported by the master, are consistent, and many of them only consistent with the idea of an assumed liability, to transport the property in this case from Swanton to Medford.

Such, we think, must have been the understanding and expectation of Morse and the station agent at Swanton at the time the property was put on to the defendants' road at that place. It was according to the regular and established course of their business, and such an arrangement would have been within the legitimate scope of the authority of the station agent.

We think the fair and just implication from the whole case as we have it before us is, that the defendants, when they received the property of Morse, took upon themselves the obligation to transport the property safely from Swanton to Medford, and such being the case, they are liable to Morse for the injury the property sustained on its way, as reported by the master.

As there are two cases now before us between the same parties, depending upon the same principles and similar facts, the entries will be in both cases that the decree of the Chancellor accepting the report of the master and fixing the liability of the defendants, and the account thereof, is affirmed, and the cases remanded to the Court of Chancery for final disposition.

The foregoing case is interesting to the profession and to business men, as tending to define the grounds upon which the courts will imply a contract to deliver goods at their destination, the transit extending over more than one company's line. That is, at the present time, the most embarrassing problem connected with the duty of railways as common carriers. Almost all the through transportation extends over numerous successive lines, and many of them almost completely consolidated into one trunk line, and under one management. In all such cases it must be expected, of course, that the company receiving the goods and executing the bill of lading stipulating for a delivery at the end of the route, as in the present case, will be held responsible for safe delivery at that point. But where any such responsibility is expressly repudiated in the bill of lading, as is now the more common practice on these long lines of transportation, it will be impossible to hold the first company responsible

for damage occurring upon the line of the other companies without practically adopting the English rule, that such is always the implied understanding. This implication obtains in the English courts, even where part of the line is by steamboat: *Wilby v. West Cornwall Railway*, 2 H. & N. 702. And where there is in such case an agreement between the railway company and the steamboat line to run in connection and divide the freight, both companies are held responsible for all contracts made by either: *Hayes v. South Wales Railway*, 9 Ir. Com. Law 474; *Webber v. Great Western Railway*, 3 H. & C. 771.

From the extreme difficulty of defining precisely what is sufficient ground to imply a contract by the first company to carry through, there is a constant tendency toward the adoption of the English rule, as being more easy of application, and, on the whole, not unjust in its operation with reference to connecting lines of freight transportation. Indeed in all cases, where the companies for the en-

tire line are so connected, that each company receiving goods for transportation, fixes the rate of compensation for the whole route, and it is all received and receipted for in one gross sum, there should be an implied undertaking raised for safe transportation through the entire route on the part of the company receiving the goods: *Angle v. Mississippi, &c., Railway*, 9 Iowa 487. But it is said here, that if the consignee knew, or might readily have learned, that there was no partnership connection between

the different companies, but only one of agency, this will rebut the implication.

The rule stated in the principal case seems quite unobjectionable, that where there is a business connection between the different companies throughout the route, and the consignor has reason to believe that the company to whom he delivers the goods held themselves out as responsible for the entire route, he will be entitled to so hold them.

I. F. R.

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*Louisville Court of Chancery.*

WILSON, PETERS & CO. v. SEIBERT.

A mortgage of future-acquired chattels is valid only when the property mortgaged may be regarded as a part of, or *accretion to*, property in actual or legal possession of the mortgagor at the time of making the mortgage.

A mortgage of property in which the mortgagor has no present interest, and which he must acquire, if at all, in *substitution for* or independently of any property he now has, is not valid to create any lien which equity will recognise or enforce.

THE opinion of the court was delivered by

WOOLLEY, Chancellor.—Can a mortgage upon chattels, to be acquired, and having *then* no existence, create a lien against future creditors? And, if so, in what cases will such a mortgage be sustained?

These questions have never been decided expressly by the Supreme Court of Kentucky, and that fact and their importance have made them obtain from me great attention.

The arguments of both counsel were unusually elaborate and satisfactory, and the large number of authorities to which they referred me pointed at once to the true line of inquiry.

In the case of *Morrell v. Noyes*, decided in Maine in 1864, and reported in 3 Am. Law Reg. N. S. 18, it was held that such a mortgage was good by a railroad corporation upon rolling-stock and machinery to be purchased in the future, and to be applied to the road itself, as an accretion to the property of the mortgagor. It will be observed that use and accretion, and not traffic

or sale, mark the property covered by the mortgage in the case referred to.

In the case of *Pennock v. Coe, &c.*, 23 Howard 119, the Supreme Court of the United States gave a similar decision. The counsel for the mortgagee made a vigorous attempt to induce the court to lay down the broad doctrine that there was no difference between a mortgage upon things *in esse* and things *in futuro*, and in which the mortgagor had, at the time, neither potential nor contingent interest. In support of his attempt he referred to *Fonblanque*, B. 1, No. 4; *Powell on Mortgages* 190; *Coote on Mortgage Law* 185; *Noel v. Burley*, 3 Simons 103; *Metcalfe v. Archbishop of York*, 1 Mylne & Cr. 553; *Langhton v. Horton*, 1 Hare 539; *Matter of Howe*, 1 Paige 125, 129; *White v. Carpenter*, 2 Paige 217, 266; *Foreman v. Proctor*, 9 B. Monroe 124; *Abbott v. Gordon*, 7 Shepley 408; *Jenkes v. Goffe*, 1 Rhode Island 511; *Field v. The Mayor of New York*, 2 Selden 179, 186; *Winston v. Mitchell*, 2 Story 630, and Story's Eq. Jur. §§ 1040, 1055.

I have carefully examined all of these authorities, which were either in the public or in my private library, and found that they were either foreign to the question, or were cases in which the mortgage covered future property, which was to be an accretion to the property then owned by the mortgagor, either by adding the future to the present, or by growth.

This idea of accretion runs through all the cases, which evidently contemplate that the present property is to be retained, and that the future property is not to be substituted, but merely added. Hence the Supreme Court, in the case above referred to, refused to yield to the counsel of the mortgagee, and sustained the mortgage upon the restricted ground, that the rolling-stock afterwards to be acquired was intended not to displace the old capital fund, but would be a necessary accretion to it; because without rolling stock the railroad, which was the capital fund, would be valueless.

In the case of *Mitchell v. Winston*, 2 Story's Rep. 630, decided by Judge STORY, the mortgage covered the machinery and tools then in possession, and machinery, tools, and stock *in futuro*. The learned judge held the mortgage good. I looked into every case to which he referred, and to which I had access, and he referred to many, and I found that all had reference to future pro-



perty, to accrue to or grow upon that which was already in existence, which was to be retained and not circulated in trade. In other words, the future property was to be an accretion, not a substitution. So far, therefore, as that case held good the mortgage upon future machinery to be added to that which was then in possession, and which it was contemplated would be retained, the decision was correct, but so far as it held that the future goods were also covered, it is not supported by previous authorities, and is disregarded in England, Maryland, Maine, and Massachusetts. It may have doubtful rest if placed upon the ground that the future stock would be the growth or product of the machinery then in use; otherwise it is singular.

But that case does not apply to this, because in that the stock would be the product of great labor and change coming from capital, skill, and machinery, and these things carry with them some idea of accretion.

But where there is the mere sale of goods unchanged in shape or quality, and the mere investment of the proceeds in the same species of goods, which are again to be sold in like manner, and so on *toties quoties*,—under such circumstances there may be profit, but surely there is neither accretion nor growth. The proper word is substitution.

In the case of *Phillips v. Winslow*, 18 B. Mon. 445, the mortgage was upon the railroad, and the question was whether the recital that its engines and machinery, to be afterwards acquired, should be included, created a lien. The court held that the lien attached, and lodged their reasoning expressly upon the ground that the future-acquired property was to be added to the present, and for its benefit.

And lest they might be misunderstood, the learned judges declared, "We do not deem it necessary to decide in this case whether, under ordinary circumstances, a mortgage on subsequently acquired property would be valid, or pass any title to the property." And in the next sentence they declare that their decision is governed by the particular facts of the case, "and not by the general law upon the subject."

I was informed that the question had been decided by my learned predecessor, Chancellor LOGAN, whose opinion was affirmed by the Court of Appeals in the case of *Sayre v. Lamdin*, No. 13,227, in this court. An examination of that case, assisted by

both counsel, has shown that no such opinion is now in the papers, and high authority has suggested to me that Chancellor LOGAN entertained different views.

It is upon these and many other similar cases, that the mortgagee rests his claim.

When we now turn to cases directly against him, and directly upon the question, the authorities are numerous, consistent, and logical.

In the case of *Holroyd v. Marshall*, 9 Jurist 213, decided in 1863 by a great court, and supported by the illustrious names of Lord WESTBURY, Lord WENSLEYDALE, and Lord CRANWORTH, it was held that the mortgage would not cover after-acquired property, unless it was to be an accretion by addition or growth. In *Mogg v. Baker*, 3 Meeson & Welsby 195, it was declared by Baron PARKE that "if it was only an agreement to mortgage furniture to be subsequently acquired, to give a bill of sale at a future day of the furniture and other goods of the insolvent, then it should cover no specific furniture, and would confer no right in equity."

In *Morrill v. Noyes*, referred to above, the whole question is examined with consummate ability and decided with singular accuracy. The cases of *Edgitt v. Hart*, 5 Selden 216, *Davis v. Ransom*, 18 Illinois 401, *Collins v. Myers*, 16 Ohio 547, are sufficiently decisive of the illegality of the mortgage in this case.

It is laid down in Comyn's Dig., tit. *Grant*, D., "that a man cannot grant a thing which he has not." So in Bacon's Abridgment, tit. *Grant*, D., it is said, "a man cannot grant all the wool that shall grow upon his sheep that he shall buy afterwards, for there he hath it not actually or potentially." The thing sold must have an actual or potential existence. See 2 Kent 468. If the seller own the sheep he can sell the wool afterwards to grow. See also 4 Metcalf (Mass.) 306, 2 Cush. 300, and 7 Ad. & E. 850, which illustrate the question. Nothing can be stronger in the same direction than the decision of Chief Justice TINDAL in *Lunn v. Thornton*, 1 Man. Gr. & Scott 379, decided in 1845.

It must be conceded, as a general proposition, that a mortgage of such goods as may be in store on a future day, or of such furniture as may be in a house, when no particular property is referred to, will not convey any title to, or create any lien upon, such property subsequently acquired which can be upheld or enforced

in a suit at law. All the books declare that; and equity, according to the cases I have examined in England and America, holds the same doctrine, except when there is a thing in possession of the seller to which the other things can attach in future as a part of the thing possessed, and not in substitution for it. A man cannot give or sell that which at the time of sale is not either within his actual or potential possession. *Qui non habet, ille non dat.* The Maine Case affirms: "The vendor or mortgagor must have a present actual interest in it or concerning it."

And, according to the 14th rule of Bacon's Maxims, "the law doth not allow of grants except there be the foundation of an interest in the grantor." And in the case just referred to the court says that "there must be something *in presenti*, of which the thing *in futuro* is to be the product, or with which it is to be connected, as necessary for its use, or as incident to it, constituting a tangible existing basis for the contract."

If a merchant owning one bale of cloth should by mortgage declare that that bale, and all other bales he should hereafter acquire, should be subject to the mortgagee's claim, surely one hundred bales, bought months or years afterwards, could not be considered the product of the present bale in possession. I have yet to learn that if a liveryman sell one horse, and with the money buy another, the second is the product of the first. It has been held that if a man contracts for the construction of a carriage or ship, and even pays for it, he cannot sell or mortgage the ship or carriage; but if he buy one in process of construction he can.

After having examined the English and American cases, I was curious to see how the question was treated in the civil law, and I have looked into it.

I find the doctrine the same as in England and America. On page 649, 1 Domat, Cushing's edition, it is said, "this mortgage extends to all the things which they shall afterwards acquire, that are capable of being mortgaged, by what title soever it be that they acquire them, and even to those which are not in being when the obligation is contracted; so that the fruits which shall grow upon the lands will be comprehended in the mortgage of an estate to come." On page 650 it is said: "Although the mortgage be restrained to certain things, yet it will nevertheless extend to all that shall arise or proceed from that thing which is mortgaged, or shall augment it and make a part of it. Thus the fruits which

grow upon the lands that are mortgaged are subject to the mortgage, while they continue unseparated from the ground." The great jurist proceeds to give a number of like instances, as the foals, the lambs and other produce of beasts that are mortgaged; and the accretion to mortgaged lands by the alluvion which the river may make.

All these go to illustrate the established English doctrine that a mortgage of property to be acquired *in futuro* extends only to such things as may be the product of, or the accretion to, a thing already in existence to which those to come will or may attach.

The idea of substitution is everywhere ignored.

An eminent jurist and author, Chief Justice REDFIELD, in his review of the Maine Case, in 3 American Law Register, referred to above, confesses that a mortgage of future-acquired goods, merely for the purpose of merchandise, is void both at law and equity, and he bitterly laments that courts of equity are not as progressive as merchants, otherwise such a mortgage would now be sustained.

I am not persuaded that I should share his lament. Policy and principle indicate a different course.

It is the very essence of commerce that merchandise shall be shipped the world over, without clogs, hindrance or fetters, except while in the hands of the possessor. If every bale of goods which comes to this city should, the moment it touches the wharf, be fettered with a long-made and unknown mortgage, the merchants of New York would look elsewhere for their correspondents. If every barrel of pork or hogshead of tobacco shipped to New York, at once became liable there to a previous debt of the consignee, with which the consignor had no part or acquaintance, the merchants of Louisville would look elsewhere for a market. If all the cities of the world were to adopt such a course, I doubt whether commerce would be advanced.

I am of opinion that the mortgage is invalid, and that it was made for the purpose of hindering creditors in the collection of their debts. It is fraudulent in law, and I am not sure that it is not fraudulent in morals. The attachment should be sustained.

*District Court of the United States for the District of Wisconsin.  
In Admiralty.*

**THE GERMANIA INSURANCE CO. AND OTHERS v. THE STEAMBOAT  
LADY PIKE, CHRISTOPHER G. PEARCE AND OTHERS, CLAIMANTS.**

A steamboat towing three loaded barges down the Mississippi river, in approaching bridge piers too closely to back or stop, the tow is driven against a pier by a sudden and unanticipated gust of wind: the carrier is not liable for loss or injury of the cargo of one of the barges.

MILLER, J.—This steamboat, at a port on the Mississippi river below St. Paul's, was contracted with to proceed up that river and up the Minnesota river to Shokopee, in the state of Minnesota, with three barges; and there to take on board the barges wheat in bulk, and to transport the same to Saranak, on the first-named river, in the state of Illinois. The wheat was put aboard the barges to be delivered in good order, *unavoidable dangers of the river* and fire only excepted. Heading down the Mississippi river, the steamboat with the three loaded barges, two on her larboard and one on her starboard side, and running between piers of the railroad bridge near St. Paul's, the larboard barge collided with a pier, and the wheat on board said barge was greatly damaged. The insurance companies having paid the loss, brought this libel.

The accident happened about three or four o'clock in the afternoon of April 24th.

Claimants allege in the answer that the steamboat and barges left Shokopee in good order, and proceeded on the trip with all possible care, caution, and skill; that when passing through the piers in the usual way, and while in the usual channel for such passage, the steamboat and barges were by a sudden gust of wind blown to the larboard, so that the larboard barge struck the pier on that side and was sunk. It is further alleged that the steamboat and barges were fully and completely manned and equipped, and in all respects river-worthy, and were carefully and skilfully managed at the time of the injury, and that the sinking and consequent loss was an unavoidable danger of the river. The charge in the libel of negligence and improper conduct is denied in the answer.

There is no doubt from the evidence that the boat and barges

were in good order for the service, fully equipped and manned, and in every respect river-worthy. There happened to be on board two captains and also two pilots at the wheel, at the time of the accident, and every man on board was then at his post of duty.

The river was high, with a current at the piers of about three miles to the hour, and nearly in line with the piers. By measurement on the ice the space between the piers was 116 feet, which probably would be increased some at a high stage of water by an inward inclination of the walls of the piers. The tow measured in breadth about 105 feet. The tow was running for the centre between the piers, and in a calm would clear them by about five and a half or six feet. Occasional gusts of wind met the tow through the day, but for an hour before reaching the piers there was a calm, and those on board had no anticipation of wind on approaching the piers. But when within the length of the boat from the piers a sudden gust of wind struck the tow and forced it against the pier and stove the barge. The boat was light, and having but a stern wheel she could not back with the three loaded barges in time to avoid the collision, but was obliged to keep on her course. The rate of speed was then about seven miles an hour. The channel seems to be divided, a portion passing between the piers, which was pursued by the tow, and a portion between the adjoining piers, which is wider, but it is said was not then taken by tows on account of a sunken barge. Other tows loaded passed in the course taken by this tow in safety; and this tow passed up safely three days before the accident, with the knowledge of the shipper. It is not settled that the current could have caused the collision with the pier. Some witnesses testify that it is unsafe to pass a tow of that breadth between those piers. And it is also testified that the piers should have been approached at a slow bell. On the other hand it is testified, by experienced river steamboat men, that the boat would be more manageable at the rate of seven miles an hour than slower. I think this latter opinion is the more satisfactory. And experience has tested the safety of passing between those piers with tows about the breadth of this one. I am well satisfied that if the piers had been approached by the tow under a high wind the boat should be condemned for unskilfulness of the officers. But there was a calm until the approach to the pier was too close to admit of avoiding the effect

of an unanticipated and sudden gust of wind. It is contended that the alleged cause of the collision was an afterthought, as it is not mentioned in the protest. The omission may possibly tend to weaken the force of the testimony on this subject; but it is not probable that such a number of witnesses, including nearly every man on board, would testify to a fabrication. I consider the alleged cause of the collision established by the proof. Libellants insured against the consequences of the collision; but did the contract of the carrier guarantee indemnity to the shipper?

The Supreme Court of the United States in *The Niagara v. Cordes*, 21 How. 8, lay down the position that a common carrier is responsible for every loss or damage however occasioned, unless it happened by the act of God or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading. In *Clark v. Barnswell*, 12 How. 272: Although the injury to a portion of the cargo may have been occasioned by one of the excepted causes, yet still the owner of the vessel is responsible if the injury might have been avoided by the exercise of reasonable skill and diligence in the storage or care of the goods on the part of the persons employed in the conveyance of the goods. The *onus probandi* then becomes shifted upon the shipper to show the negligence. This case involved exclusively the duty of a master in the stowage and care of the cargo. In *Stainback v. Rae*, 14 How. 532, the collision being considered the result of inevitable accident, neither party was held liable; also *The Morning Light*, 2 Wallace 550. Inevitable accident must be understood to mean a collision when both parties have endeavored by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident: *Steamship Co. v. The New York and Virginia Steamship Co.*, 24 How. 307. In *New Jersey Nav. Co. v. Merchants' Bank*, 6 How. 344-347-383; it appears to be the understanding that under the exception in this bill of lading it is incumbent on the carrier, in order to relieve himself from responsibility, to prove that due diligence and proper skill were used to avoid the accident, and that it was unavoidable. The carrier must satisfy the court by clear and conclusive testimony that there was no default on his part; and that every reasonable effort was made to avoid the accident. But he is not expected to warrant that his crew is

perfect, or that his boat or vessel is perfectly secure, or that he pursued the best course on his voyage. It is sufficient if the crew and vessel are in all respects adequate to the particular duty and service, and that the course taken was used ordinarily and proved to be safe.

I am satisfied that the defence is available to claimants within the exception in the bill of lading. A carrier is not responsible for the effects of sudden gusts of wind. This is a danger and accident of navigation over which he has no control, and against which his contract contains no warranty. Boisterous weather, adverse winds, and low tides are beyond the control of carriers on the ocean, and relieve them from responsibility for delay in the voyage, or injury to the cargo. Upon the same principle should a carrier not be answerable for goods lost by tempest or a sudden gust of wind. An act of God relieves the carrier when using due caution and skill.

In the case of *Amies v. Stevens*, 1 Strange's Rep. 128, the plaintiff put goods on board the defendant's hoy, who was a common carrier. Coming through a bridge by a sudden gust of wind the hoy sunk, and the goods were spoiled. The plaintiff insisted that the defendant should be liable, it being his carelessness in going through at such a time. The defendant was held not answerable, the damage being occasioned by the act of God, an extraordinary accident. In *Colt v. McMechan*, 6 Johns. Rep. 160, where a vessel was heading up the Hudson river against a light and variable wind, and being near shore, and while changing her course the wind suddenly failed; in consequence of which she ran aground and sunk. It was held that the sudden failure of the wind was the act of God and excused the master, there being no negligence on his part. KENT, C. J., concurred in the opinion that the sudden failure of the wind was the act of God; and an event which could not happen by the intervention of man, nor be prevented by human prudence. But he thought there was a degree of negligence imputable to the master in sailing so near the shore under a "light and variable wind," that a failure in coming about would cast him aground. "God caused the gust to blow in the one case, and in the other the wind was stayed by Him." It is well settled that when collision or loss occurs in the absence of fault on the part of the carrier, and under circumstances beyond his control from *vis major*, as from storm, or waves,



or reflux of the tide, or lightning, he is not held liable: Abbott on Shipping (Perkins' ed.) 470, 471, 472, 473, 474, 475, and cases cited.

The bill will be dismissed.

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#### LEGAL NOTES.

PARDON—DELIVERY—REVOCATION BY NEW EXECUTIVE. *Matter of Moses De Puy*, in the District Court of the United States, for the Southern District of New York (June 1869), was a petition for discharge on *habeas corpus*. It will be recollected that the petitioner had been convicted at the January Term 1869, of this court, of having rescued distilled spirits from the custody of a revenue officer of the United States, and on March 3d 1869, President Johnson had signed a pardon, which was revoked by President Grant among the first acts of his administration. The facts, which elicited much comment at the time, appear by the judicial investigation to have been as follows: One James M. Nelson presented a petition to the President on behalf of De Puy, praying a pardon. On March 3d 1869, the President endorsed on this petition a direction that a pardon be issued, and handed this to Nelson with a direction to take it to the Attorney-General. Nelson took the petition to the Attorney-General and left it with him, receiving a letter to the Secretary of State, requesting the Secretary to issue a warrant for the pardon of De Puy, with certain recitals. Nelson took this letter to the Secretary of State, obtained a pardon which he took to the President, procured his signature and brought it back to the Secretary of State, who then signed it and directed his clerk to have the seal put to it, and to transmit it, with a letter in relation to it, to the Marshal of the Southern District of New York. Nelson asked if he could not take the pardon, but was told that it must go by mail to the marshal in the usual course of business. The pardon was dated March 3d 1869, and recited the conviction of De Puy, and the reasons in consideration of which the President pardoned him on condition of the payment of the fine which was part of his sentence. This pardon was sent by mail to the marshal, with a letter in the following terms: "Sir, I transmit herewith the President's warrant for the conditional pardon of Jacob and Moses De Puy, the receipt of which you will please acknowledge. Yr. obt. servant, F. W. Seward." The pardon and letter were received by the marshal March 5th 1869. On the next day, while the pardon was still in the marshal's hands, he received a message by telegraph from the Secretary of State directing him to regard it as cancelled and return it to the State Department, which was accordingly done. The invariable custom of the State Department in issuing pardons, is to send them by mail to the United States marshal of the district in which the prisoner is confined, and the marshal usually transmits them to the keeper of the prison. The turning-point of the case was as to the delivery of the pardon, the petitioners insisting that the act of mailing it to the marshal was a full delivery in the only

manner recognised by the Executive Department, and passed the entire control of the pardon out of the hands of the President, and entitled the petitioner to his liberty on compliance with the condition—that is, payment of the fine, which had been done. The district attorney, on the other hand, contended that the marshal was a part of the executive, and until the pardon had passed out of his hands and into those of the prisoner or his agent, it was not delivered, and was therefore revocable.

BLATCHFORD, J., in giving judgment, made an elaborate review of the subject of delivery in relation to pardons, citing *Marbury v. Madison*, 1 Cranch 137; *U. S. v. Wilson*, 7 Peters 150, and *Commonwealth v. Halloway*, 44 Penn. 210, 2 Am. Law Reg. N. S. 474, and held, that as the marshal in this case was the messenger of the President, and not the agent of the prisoner, and there had been not only no delivery to the prisoner, but none to the warden of the prison who had sole control and custody of the prisoner, there had been no delivery of the pardon, and it was legally revoked by the action of the President.

Our readers will find all the principal American cases on the subject of pardons, collected in the note to the very curious and interesting case of *Commonwealth v. Halloway*, 2 Am. Law Reg. N. S. 474.

**CONSTITUTIONAL LAW—POWER OF THE PRESIDENT TO APPOINT TO A VACANT OFFICE, WHEN THE VACANCY DID NOT OCCUR IN THE RECESS OF THE SENATE.** *Schenk v. Peay and Bliss*, in the United States Circuit Court, District of Arkansas (April 1869), was a bill in equity to quiet title to certain real estate as against one defendant, and for partition as to the other. Peay, one of defendants, was the original owner of the real estate; Bliss, the other defendant, was the purchaser under a tax sale under the Direct Tax Act of Congress of 1861, and the amendment of June 7th 1862, and Schenk, plaintiff, was a purchaser from Bliss. Peay filed an answer and a cross-bill against plaintiff and his co-defendant, which the court (MILLER, Circuit Judge, and CALDWELL, D. J.) after argument allowed, although Peay and Bliss were both citizens of Arkansas, the parties being already before the court, and the court being satisfied that the matters in the cross-bill were strictly defensive to the original bill, and necessary to bring before the court in a proper shape the defence relied on, and also that the interests of Bliss, though he was nominally a co-defendant, were substantially with the plaintiff and against Peay. The court also appointed a receiver on the petition of plaintiff in the cross-bill, although defendants (in the cross-bill) were in possession of the land under legal title.

The main question in the case, however, was the validity of the sale by the tax commissioners, under which plaintiff claimed title. The Act of June 7th 1862 (12 Stat. 422), authorized the President to appoint three persons who should constitute a board of tax commissioners. The court held that all three must act to make the exercise of their authority valid, and that the Act of March 3d 1865, § 3 (13 Stat. 502), declaring that a majority of the board should have power to act, was not retrospective, and did not cure a title under sale by two commissioners prior to the passage of the act.

Subsequently, on final hearing on amended pleadings, the court (CALDWELL, D. J.) held:—

1. The Act of July 20th 1868 (15 Stat. 123), is retrospective in its

terms, but does not give validity to the acts of two tax commissioners unless there were three in office at the time.

2. One who was appointed to office without authority of law, and who never performed any duty, and never had the reputation of being such officer, is not an officer, *de jure* or *de facto*.

3. Where an office was created and took effect during a session of the Senate, and that a subsequent session of Congress passed without the office being filled, the President could not make a valid appointment to the office during the recess of the Senate.

On the last point the court cited with strong commendation, and relied on the opinion of CADWALADER, J., in *The case of the District Attorney*, 7 Am. Law Reg. N. S. 786, and also *People ex rel. v. Forquier*, 1 Breese 70.

The subject of sales under the Direct Tax Acts was elaborately considered in the opinion of CALDWELL, J., and the sale in this case declared void, both for defect of jurisdiction, and for fraud in the acts of the commissioners.

ESTOPPEL TO ALLEGE UNCONSTITUTIONALITY OF A LAW. *Ferguson et al. v. Landrum et al.*, in the Court of Appeals of Kentucky (June 1869), decides a novel point in relation to the law of estoppel. In 1864 the President of the United States ordered a draft for military service. The people of Gallatin county, to avoid the draft, held a public meeting and resolved to raise a bounty fund to induce the requisite number of men to volunteer; and appointed a committee to borrow the money, and obtain an Act of the Legislature authorizing the levy of a tax to repay it. This plan was carried out, the act passed by the legislature authorizing a bounty tax, the money borrowed, and the volunteers obtained. In 1865 a number of citizens of the county filed a bill to restrain the collection of the tax on the ground that the act authorizing it was unconstitutional, and the Court of Appeals so held (ROBERTSON, J., dissenting) on the ground that the United States having called on the people for military duty as a government directly, and not through the medium of the states, the state had no constitutional power to levy an involuntary tax on the people of the counties to give the Federal soldier an additional compensation, nor had it power to levy such tax on those not liable to military duty, to aid those who were, in avoiding its performance by the additional compensation to volunteers. (On this point see *Opinion of S. C. of Maine*, 2 A. L. R. N. S. 621; *Speer v. School Directors*, 4 Id. 661; *Booth v. Woodbury*, 5 Id. 202; *Taylor v. Thompson*, 6 Id. 174.) But the most interesting point is the farther opinion of the court, based on grounds of general equity, that all persons liable to military duty, either in their own persons or those of their minor sons or slaves, had received a valuable consideration for the money loaned, and would not be allowed now to refuse payment, and all who participated in the procurement of the law, or afterwards voluntarily ratified the action of the committee under it, were *estopped* from now setting up its unconstitutionality as a defence to the collection of the tax under it.

FEDERAL AND STATE COURTS—THE CONFLICT OF JURISDICTION IN IOWA. The County of Lee, Iowa, in 1857, under a statute of that state, issued its bonds in aid of certain railroads. At the time of issue,

the right to make such bonds was sustained by the Supreme Court of Iowa. (*Dubuque County v. Dubuque and Pacific Railroad Co.*, 4 Greene 1; *State v. Johnson County*, 10 Iowa 157, and other cases.) Subsequently, in June 1862, in the case of *State ex rel. v. Wapello County*, 13 Iowa 390, the Supreme Court of Iowa overruled its previous decisions, and held that the constitution prohibited the issue of such bonds, and that they were absolutely void. A holder of a similar bond then brought an action in the Circuit Court of the United States for the District of Iowa, and it was there decided, on the authority of *State v. Wapello County*, that he could not recover; but, on a writ of error, the Supreme Court of the United States, at the December Term, 1863, in *Gelpcke v. City of Dubuque*, 1 Wall. 175, said that although it was the practice to follow the latest decisions of the state courts in construing state laws and constitutions, yet it would not necessarily follow a decision overruling previously settled law, and which might prove to be a mere oscillation in the course of a judicial construction.

The court therefore held that the bonds were good, and refused to follow the decision in *State v. Wapello County*, so far as regarded bonds issued before that decision was made. This view has since been affirmed in *Thompson v. Lee County*, 3 Wall. 327, *Rogers v. Burlington*, 3 Wall. 664; while, on the other hand, the Supreme Court of Iowa has adhered to its decision in *State v. Wapello County* in numerous subsequent cases: *Meyers v. Johnson County*, 14 Iowa 47; *McMillan v. Boyle*, Id. 107; *Rock v. Wallace*, Id. 593; *Smith v. Henry County*, 15 Iowa 385, and *Ten Eyck v. Mayor of Keokuk*, Id. 485.

From this difference of views between the courts of the United States and the state of Iowa, a conflict of jurisdiction has recently arisen, which we should regard as very serious were it not for the good judgment and moderation of the courts by which it must finally be determined.

The county of Lee was one of those which issued bonds in aid of railroads, in the year 1857. Interest on these bonds was paid for several years, and in July 1860, a bill was filed by certain citizens and taxpayers of that county, for an injunction to the supervisors of the county to restrain the assessment and collection of any tax for payment of interest or principal. The bondholders were not made parties to this bill; the county officers alone were made defendants. The only relief sought was to restrain the levy and collection of taxes by the county officers for the payment of railroad bonds or coupons.

The case went on appeal to the Supreme Court, which, on December 1st 1862, gave judgment for complainants, and on June 5th 1863, entered a decree *nunc pro tunc*, perpetually enjoining the defendants from levying or collecting any tax for payment of said bonds: *McMillan v. Boyle*, 14 Iowa 107.

This decision of the Iowa Supreme Court was made *before* the decision of the United States Supreme Court in *Gelpcke v. City of Dubuque*, *supra*, and also before the commencement in the United States courts of the action next to be mentioned.

In April 1863, J. Edgar Thompson, a citizen of Pennsylvania, and a holder of bonds of Lee county, brought an action upon his coupons, against the supervisors, in the United States Circuit Court for Iowa, which was subsequently transferred to the Circuit of Northern Illinois,

which, at the October Term, 1864, rendered judgment for plaintiff. The judgment being unpaid, and there being no property on which an execution could operate, the United States Circuit Court for N. Illinois, in July 1868, issued an alternative, and in October, a peremptory *mandamus* to the supervisors of Lee county, commanding them to levy a tax to pay the judgment. No return was made by the supervisors to either writ, but on the day the peremptory writ was served on them, they passed a resolution setting forth the above mentioned injunction, proceedings and decree of the Supreme Court of Iowa, and that they were *unable* to comply with the mandate of the writ without committing a contempt of the Iowa court, and violating their oath of office to obey the laws of the state of Iowa. At the January Term, 1869, the Circuit Court, on application and proof of the foregoing facts, issued an attachment against the supervisors for *contempt* in disobeying the mandate of the *mandamus*. The opinion of DRUMMOND, J., will be found in full in Chicago *Legal News*, for January 16th, 1869.

Under this attachment, the United States marshal for Iowa, on March 3d, took the supervisors in custody, but before getting out of the state, was served with a *habeas corpus* issued by Judge BECK (of the Supreme Court of Iowa) sitting at chambers, who, on hearing, discharged the supervisors from custody. We have been furnished with a pamphlet copy of the opinion of Judge BECK, and regret that its length prevents our giving it in full. The first point made was on the jurisdiction of a state judge to inquire on *habeas corpus* into the cause of detention after a return setting forth that the prisoners were held under process issued by a court of the United States. On this vexed point Judge BECK's conclusion is: "That where one is held in imprisonment under claim of Federal authority, and it appears that such restraint is illegal, in that the officer holding him has no power to do so under the law, his authority therefor being based upon a judgment void for want of jurisdiction, the state court, under the writ of *habeas corpus*, has the power to release from the imprisonment." The judge admits that the authority of the Supreme Court of the United States, in *Ableman v. Booth*, 21 How. 516, is against his conclusion; but expresses a confident opinion that that case will be overruled when the point shall again arise in the same court. Judge BECK does not claim any authority to examine into the legality of the attachment for contempt on any other ground than the want of jurisdiction of the court over the persons of the supervisors, or the subject-matter in the *mandamus* proceedings.

Being of opinion that he had authority to inquire into the jurisdiction of the court issuing the attachment, Judge BECK then proceeds to show that it had no jurisdiction of the subject matter, because it was a subject of concurrent jurisdiction in the United States and the state court, and the latter having acquired jurisdiction first by injunction issued before the commencement of the action by Thompson, its jurisdiction became exclusive by the well-settled doctrines of comity. On this point the judge distinguished the case from *Riggs v. Johnson County*, 6 Wall. 166, and *Weber v. Lee County*, Id. 210, in which the Supreme Court of the United States decided (CHASE, C. J., and GRIER and MILLER, JJ., dissenting) that the Federal courts could issue *mandamus* to a state officer to do an act, from which he had

been enjoined by a state court, the Federal court in those cases having first acquired jurisdiction of the parties and subject-matter.

The marshal has appealed from the order of Judge BECK to the Supreme Court of Iowa, where the case (under the name of *Holman et al. v. Fulton*) has been heard by the full court, but not yet decided. Should the court reverse Judge BECK's order, the supervisors will be remanded to the custody of the marshal, who will of course take them before Judge DRUMMOND, as commanded in the writ. If, however, the court affirm Judge BECK's order, the case will go to the Supreme Court of the United States, whose decision will be final, and will, without doubt, be promptly obeyed by the Supreme Court of Iowa. Indeed it is proper to say in reference to that court, whose position has been somewhat misunderstood, that, while firmly maintaining its right to conclusively construe the laws and constitution of Iowa, it has from the beginning of the difference of opinion between it and the United States Courts, yielded a ready obedience to the judgments of the ultimate tribunal, even when unconvinced of their intrinsic soundness. Thus in *Thompson v. Lee County*, 22 Iowa 206, (1867), plaintiff recovered a judgment in the federal court upon railroad bonds, which would have been held void by the state courts had he sued originally in them. Upon the record of this judgment he sued in the state court, and recovered judgment, the Supreme Court of the state holding that the judgment of the Federal court was conclusive, and the county could not again raise the question of the constitutionality of the bonds.

The moderation and sincere desire to have every point settled in the due and regular course of law, manifested by the Iowa court in every apparent conflict like the present, is in praiseworthy contrast with the hasty and reckless action of the New York court, in the matter of Pratt referred to below.<sup>1</sup>

**FEDERAL AND STATE AUTHORITY—CONFLICT OF JURISDICTION IN NEW YORK.** One J. H. Pratt was arrested (August 6th 1869) by the United States Marshal for the southern district of New York, on a warrant issued by United States Commissioner Osborn, charging that said Pratt, on October 4th 1868, at Jefferson, in the state of Texas, did commit murder by forcing the safeguard of United States troops and killing certain persons named, and that he did then and there with others commit the crime of treason against the United States. Pratt was committed by the commissioner to the custody of the marshal, to be produced for examination on August 9th, at 2 P. M., and was by the marshal placed in custody of the keeper of the county jail. On August 7th, Judge McCUNN, of the Superior Court of New York, issued a writ of *habeas corpus* to the keeper of the jail, commanding him to produce Pratt before him (McCUNN) on August 9th, at 12 M. At that time the jailer, following the course laid down in *Ableman v. Booth*, 21 How. 506, made return that Pratt was held under process of the commissioner, setting forth the warrant, but not producing Pratt

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<sup>1</sup> Since writing the above, we learn that the Legislature of Iowa at its last session, passed "an act to enable public corporations to settle their indebtedness" (Laws 1868, ch. 67, p. 85,) under which the counties and towns indebted, are taking up their bonds and paying in new bonds, so that this long and unpleasant controversy will be speedily settled.

Judge McCUNN thereupon said that Pratt must be produced, and directed the jailer to have him in court at 2 P. M., on pain of attachment for contempt. This was the hour at which the marshal had been directed to have Pratt before the commissioner, and accordingly the marshal, at about half past one o'clock, took Pratt in charge and brought him before the commissioner. At 2 o'clock the jailer came in and requested the commissioner to allow Pratt to be taken before Judge McCUNN, which the commissioner refused. After consultation, however, and under the supposition that the production of Pratt would be sufficient, and that the judge would not assert further jurisdiction, the marshal took Pratt over to the court-room and allowed the jailer to produce him before Judge McCUNN. Judge McCUNN however proceeded to hear the case on the merits, and after argument by Pratt's counsel and the United States District Attorney, made an order remanding Pratt to the custody of the marshal pending his decision. The marshal, claiming to hold Pratt not under any such remand but under the commissioner's warrant, removed him to Fort Schuyler for greater security.

On the 11th Judge McCUNN delivered an opinion discharging Pratt, on the ground that the warrant was not a legal commitment, because, first, the charge of treason, if taken unconnected with the acts alleged, was too general to be valid, and if taken in connection with the acts charged, they did not amount to treason; and secondly, the charge of murder as set forth, was a crime not against the United States, but the state of Texas, and the commissioner in New York had no jurisdiction to arrest for such cause.

On the following day the marshal was served with an order signed by Judge McCUNN, entitled "In the matter of J. H. Pratt," commanding John H. Tracy (the jailer) and Francis O. Barlow (the marshal) to discharge Pratt from custody. It will be observed that the marshal, though named in this order and served with a copy of it, was *not in any way a party to the proceedings*, or judicially before Judge McCUNN. He was not named in the *habeas corpus* nor served with process, nor was the jailer (against whom alone the writ issued) his agent or deputy. (See *Randolph v. Donaldson*, 9 Cranch 76.) The marshal, therefore, considering that Judge McCUNN had no jurisdiction to examine the merits of the case after being judicially informed that the prisoner was held under the warrant of a United States commissioner (*Ableman v. Booth*, 21 How. 506), and also that even if there was jurisdiction in Judge McCUNN to make such order, the marshal not being party to the proceedings could not be bound by it, refused to discharge Pratt, and to prevent a rescue and protect himself from arrest for contempt by Judge McCUNN, he called upon the United States military authorities for a guard, which was accordingly furnished. Some prominence was given to this part of the case by the fact that the President, being in New York, was consulted by the marshal, and ordered the commanding officer at Fort Schuyler to furnish whatever force should be necessary to protect the marshal in the discharge of his duty. Judge McCUNN thereupon prepared an order to the sheriff of New York to take Pratt by force out of the possession of the marshal and the commandant of Fort Schuyler, but this order was not issued, as on August 16th, Commissioner Osborn, on final hearing, discharged Pratt from custody, for

want of evidence to sustain the charges on which the warrant had issued. With this the whole matter terminated.

**CONSTITUTIONAL LAW—RIGHT TO VOTE—TEST OATH.** *Green v. Shumway et al.*, in the Court of Appeals of New York, was an action against the inspectors of election of the city of Syracuse for refusing to receive plaintiff's vote at the election, in April 1867, for delegates to the Constitutional Convention. The Act of Assembly of New York providing for the convention and the election of delegates to it, provided that no person should vote who would not, if duly challenged, take the following oath: "I do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise, the functions of any office whatever under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto; and did not wilfully desert from the military or naval service of the United States, or leave this state to avoid the draft during the late rebellion."

The plaintiff was challenged and refused to take the oath, whereupon defendants rejected his vote. The court, per MILLER, J., held the law requiring such an oath invalid, being in violation of the constitutions both of the United States and of New York.

**MUNICIPAL CORPORATION—CONTRACT TO SUPPLY PATENTED ARTICLE—NICHOLSON PAVEMENT.** *Astor v. The Mayor, &c.*, in the Supreme Court of New York, was a bill for injunction against the paving of Thirty-third street, in the city of New York, with Nicholson pavement, on the ground that the law required that all work done for the corporation should be on contract made with the lowest bidder, after public notice, &c., and the pavement being patented could not be the subject of public competition, and the contract was therefore unlawful. The same point was decided in opposite ways in *Dean v. Charlton*, 7 Am. Law Register 564, and *Hobart v. Detroit*, Id. 741. The court, INGRAHAM, J., held that the article in the charter and the statutes of New York did not apply to such a case, and dissolved the injunction, citing the two cases already mentioned, and also *People v. Flagg*, 17 N. Y. 584, and *Harlem Gas Co. v. Mayor*, 33 N. Y. 309.

**ECCLESIASTICAL TRIBUNAL—INTERFERENCE BY A COURT OF EQUITY.** *Charles E. Cheney v. Samuel Chase et al.*, in the Superior Court of Chicago (August 1869,) was a bill for injunction. Complainant was a minister of the Episcopal church, and defendants were also ministers of that church claiming to sit as a 'court for the trial of plaintiff, on the charge of having, "on divers occasions within the last two years or within the last six months, omitted the words 'regenerate' or 'regeneration,' in the office of infant baptism." The bill set forth that the court was not constituted in accordance with the canons of the church; that the proper notice was not given complainant; that at least one member of the court had expressed beforehand an opinion of



complainant's guilt, and that his right of challenge was denied; and that the presentment did not specify time, place or circumstances of the offence alleged, or the names of witnesses to be called to prove the allegations. The case was fully argued by distinguished counsel on both sides, and the court, JAMESON, J., commenting with much severity on the proceedings of the ecclesiastical court, held all the objections in the bill to be good, and awarded an injunction. His judgment was delivered orally (in advance of a full opinion to be filed hereafter), and is reported in the Chicago Legal News for August 7th, from which we extract the following synopsis:—

1. If an ecclesiastical tribunal proceeds to try an offender who is a church member, according to the canons of the church, a civil court has no right to interfere; but if such ecclesiastical tribunal transgress such canons, and thereby injure the temporal rights of the accused, the civil courts will, upon proper application, interfere.

2. An ecclesiastical court in this country is nothing more than a voluntary association of individuals.

3. Under canon 20 of the Protestant Episcopal Church, in the Diocese of Illinois, the bishop can only institute proceedings for the trial of a person for offences, on information coming to him from one of three sources—from a majority of the vestry, from three presbyters of the church, or from public rumor, and it is not sufficient for him to say that he has been "credibly informed," &c.

4. Under the canons the bishop should select eight persons, out of whom the accused has the right to select five, and also to twenty days' notice from the bishop in which to make the selection.

5. The accused has the right of challenge.

6. When the members of an ecclesiastical tribunal have no right to proceed at all, it will be presumed that they intend all that may befall, even the worst consequences, under the canons of the church.

7. The presentment should state the offence clearly, giving time and place, and it is insufficient to state that the accused has omitted the word regeneration in the infant baptism service on divers occasions within the past two years, without specifying the time, or place, or circumstances, or names of the witnesses who were to be called against the accused.

8. The wrongful deposition of a minister of the gospel, who is receiving a salary, is such an injury to his temporal rights, as will call for interference by a court of equity.

It is understood that the case goes by appeal to the Supreme Court of Illinois.

**INCOME TAX—MEANING OF THE WORD "PERSON"—SHAKER COMMUNITY.** Commissioner Delano has decided that the word *person* in the Internal Revenue Acts, for the purpose of taxation on incomes, includes an association or community holding its property in common, like the Shaker Community at New Lebanon, Ohio. This is a community of forty-six covenanting male members, making return through one Boyd, of the entire income of the community, and claiming to deduct \$1000 for each member. The commissioner holds that this is not correct; that the community is a *person* within the acts, and is entitled to only one deduction of \$1000. This is in reversal of a previous decision of Commissioner Lewis, but is supported by a late decision of

the Supreme Court of Ohio, which held, in *Boyd v. Lackey et al.* (not yet reported), that the individual members of this community are not tax-payers within the statute requiring a petition for highway to be signed by a majority of resident freehold tax-payers. The letter of Commissioner Delano will be found in full in 10 Int. Rev. Record 39.

**ADMIRALTY—COLLISION ON THE HIGH SEAS BETWEEN STEAMER AND SAILING VESSEL CARRYING FORBIDDEN LIGHT—APPLICATION OF STATUTORY RULES WHERE FOREIGN VESSEL IS CONCERNED.** *Sears et al. v. Steamer Scotia*, in the District Court of the United States for the Southern District of New York (Feb. 1869), was a libel by the owners of the American ship Berkshire, against the British steamer Scotia, for loss by collision. It appeared that about two o'clock in the morning of April 11th 1867, in the Atlantic Ocean, the Berkshire was sailing, with the wind somewhat free, on a course, as set forth in the libel, S. E. by E. half E., and the Scotia was steering W. by N. half N. The Berkshire discovered a white light on her port bow four or five miles off, which seemed to come directly towards the Berkshire, whose helm was put to starboard. The Scotia had all her regulation lights set, and on discovering a white light on her port bow apparently about five miles off, ported her helm and kept on, taking the light to be a steamer. The light appeared to recede gradually from the Scotia's bow until very shortly before the collision, when it began to close in, and the Scotia at once reversed her engines, but too late to avoid the collision.

The Berkshire claimed that the Scotia was in fault as she had time to avoid the Berkshire, but put her helm to port knowing that the Berkshire had the wind free, and attempted to cross her bows. The Scotia claimed that the course of the Berkshire was more southerly than was alleged in the libel, and that she was in fault because she had only a white light carried low down on her anchor stock, thereby violating the laws both of England and America, and leading the Scotia to suppose it was a steamer too far off for her colored lights to be visible, and that the Scotia's action in porting her helm, under the circumstances, was in accordance with the laws of both England and America.

The new and important question involved was, whether the Scotia, being a British vessel, could set up as a defence the violation by the Berkshire of the statutes of the United States. The court, BLATCHFORD, J., held that it could not; that a foreign vessel cannot set up against an American vessel a statute which is not mutually binding, and which would not therefore be available in favor of the American vessel against the foreigner; citing *The Dumfries*, 1 Swa. 63; *The Zollverein*, Id. 96; *Cope v. Dougherty*, 4 K. and J. 367, 389, 390, s. c. on appeal, 2 De G. and J. 614; *The Saxonia*, 1 Lush. 410; *The Chancellor*, 4 Law Times N. S. 627; and *Williams v. Gutch*, 14 Moore P. C. C. 202.

The claim on the part of the Scotia that the statute of the United States should be enforced in her favor because the rules prescribed by the British and American statutes are the same, was held not to be tenable. The court said that the practice of the English courts to enforce the English rules against vessels of other nations was founded upon the Queen's orders in Council, under the authority of sect. 58 of the Merchant Shipping Amendment Act of July 29th 1862, which

provides that whenever it is made to appear to her Majesty that the government of any foreign country is willing that the regulations shall apply to the ships of such country when beyond the limits of British jurisdiction, her Majesty may by order in Council so direct, and the passage of the Act of Congress of April 29th 1864, prescribing rules for American vessels substantially identical with the British, was properly taken as an expression of willingness on the part of the American government that the British rules should be so applied. The Act of Congress, however, contains no such authority for courts of the United States to apply the rules prescribed by it either in favor or against foreign vessels.

"The merits of the collision in this case," said BLATCHFORD, J., "must therefore be adjudicated according to the rules of navigation and usages of the sea which usually prevailed and were customarily observed at the time and place of the collision, among the ships which navigated the waters where the collision took place: *The Fyenoord*, 1 Swabey 374, 377. I can have no hesitation in saying what such rules and usages were, when I find them to have been before that time adopted, with such identity, by nearly all the nations whose ships usually navigated the waters where this collision took place, embracing, among others, the United States, Great Britain, France, Spain, Prussia, Russia, Norway, Sweden, Belgium, Bremen, Denmark, Hamburg, Lubec, Hanover, Schleswig and the Netherlands. I rest my decision on that ground, and not on any municipal statute or statutes, as such, of the United States, or of Great Britain, or of both countries. I have not been referred to, nor have I met with, any case in the United States in which this question is discussed or decided. I must, therefore, resolve it on principle. But I have no hesitation in saying, that the result I have arrived at is very satisfactory, as bearing on the interests of commerce and the safety of human life, in substituting fixed written rules observed by all the maritime nations, for those which, it is no disparagement to say, were not as definite or certain, or as universally recognised."

On this ground therefore the court held that the Berkshire was in fault, both in carrying a white light and in not carrying colored lights. The answer, however, the court said must be amended so as to set up properly the fact that the Berkshire did not, as to lights, comply with the rules of navigation and the usages of the sea, customarily observed, at the time and place of the collision, by the vessels which navigated the waters where the collision took place. On the answer being so amended, the libel would be dismissed with costs.

ADMIRALTY—DAMAGES TO SEAMAN FOR NEGLECT WHILE SICK. *Tomlinson v. Hewett*, in the United States District Court for California, was a libel for damages against the master of a vessel. Libellant was a seaman, and while on board ship was taken with small pox. The captain on assurances that he had made arrangements for his care, induced the seaman to go in a small boat to a town some fifteen miles up the river. On arriving there he found not only no such arrangements made, but no physician living there, and he had only \$17 given him by the captain. He accordingly returned, but was not allowed to come aboard the vessel, and finally went in the small boat six miles down the

river, and then rode on horseback twenty miles to another town, where he arrived so exhausted that he fell from his horse and lay on the beach for thirty-six hours before he received aid. The town to which he went was distant twenty-six miles by water from the place where libellant was put out of the vessel, and was in the direct line of the voyage; but the captain refused to take him there on board the vessel. **HOFFMAN, J.**, in giving judgment, said that the fact of the disease being malignant and infectious was good reason why the master should put the seaman ashore at the earliest moment consistent with his receiving proper care; but was no justification of the course pursued, especially as the captain knew that at a port, only twenty-six miles distant, and to which the vessel was to sail the next day, proper medical attention and care could be secured. Judgment was therefore entered for libellant for \$2500.

**CONSTITUTION OF NEW YORK—THE JUDICIARY.** The new constitution, framed by the convention last year, will be submitted to the direct vote of the people for adoption or rejection in November. The Judiciary article, which is submitted to a separate vote, provides for the establishment of a Court of Appeals, to consist of seven judges, holding their office for fourteen years. The other courts remain very much as they now are, except that the terms of the judges are lengthened to fourteen years. This is a great improvement on the present wretched system, under which the highest court in the state is liable to change one-half its members yearly. The most notable feature, however, in the new constitution is a provision that in 1873 the question shall be submitted to a vote of the people whether the judges shall not thereafter be appointed by the governor. The results of making the judiciary elective, have, it thus seems, become so apparent, that the state which first made the fatal blunder is beginning to look to its correction. We regret that the convention, certainly one of the ablest and most laborious that ever sat in that state, proceeded so timidly, and did not at once, and without hesitation, declare for a return to the system of appointment to judicial office for good behavior—the only system by which the bench can permanently retain its independence or its respectability.

J. T. M.

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## ABSTRACTS OF RECENT AMERICAN DECISIONS.

### SUPREME COURT OF NEW YORK.<sup>1</sup>

### SUPREME COURT OF PENNSYLVANIA.<sup>2</sup>

### SUPREME COURT OF VERMONT.<sup>3</sup>

ATTORNEY. See *Debtor and Creditor*.

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<sup>1</sup> From Hon. O. L. Barbour, Reporter; to appear in vol. 53 of his Reports.

<sup>2</sup> From P. Frazer Smith, Esq., Reporter; to appear in 58 Pa. Rep.

<sup>3</sup> From W. G. Veazey, Esq., Reporter; to appear in 41 Vt. Rep.

## BILLS AND NOTES.

*Guaranty of.*—A note drawn by Henninger and for his accommodation with an endorsement in the name of Noll, was also endorsed with a guaranty by Eyer and was discounted by a bank. The bank sued Eyer. *Held*, that the court erred in charging that it was incumbent on the bank to prove affirmatively that the contract of guaranty was made with them: *The Northumberland County Bank v. Eyer*, 58 Penna.

As Noll endorsed for the accommodation of Henninger and the bank was the first holder for value, the law implied that the guaranty was made to them: *Id.*

The guaranty was not distinguishable from a general letter of credit, on which an action may be maintained in the name of the person who gives credit on the faith of it: *Id.*

A guaranty is not assignable so as to enable the assignee to sue on it in his own name: *Id.*

## CONFLICT OF LAWS.

*Debt contracted in Foreign Country.*—A debt contracted in a foreign country, in the absence of a contrary understanding, is payable there and in the legal currency of that country: *Benness v. Clemens*, 58 Penna.

A judgment here, for such debt, should be in amount the value of gold in legal tender notes: *Id.*

The *lex loci contractus* must control in interpreting such contract: *Id.*

## CONSTITUTIONAL LAW.

*Obligation of Contracts.*—When town authorities have taken the land of an individual for the purposes of a public highway, and have paid the proprietor therefor, the right to the easement becomes a vested right in the public; and the public having received the land, and the proprietor the compensation, it becomes a fixed contract between them, and the provision of the Constitution of the United States declaring "that no state shall pass any law impairing the obligation of contracts" applies: *The People ex rel. Failing v. The Commissioners of Highways of the town of Palatine*, 3 Barb.

After land taken for a road has been paid for by the public, it cannot be taken from the public and donated to the former owner without any consideration paid therefor, by an act of the legislature purporting to reduce the width of the highway: *Id.*

## CONTRACT.

*In Restraint of Trade.*—Contracts restraining the exercise of a trade, &c., in particular localities, when there is reasonable ground for the restriction, are valid: *McClurg's Appeal*, 58 Penna.

An agreement for a valuable consideration not to practise medicine within 12 miles of a particular locality is not unreasonable, and the exercise of the profession within the prescribed limit may be restrained by injunction: *Id.*

The court will not inquire into the *adequacy* of the consideration: *Id.*

## CORPORATION.

*Dissolution.*—Where the complaint, in an action by the people

against the corporation for its dissolution, alleged that the corporation was insolvent 13 years before; that it then surrendered its property to its creditors; that it had remained insolvent ever since; had ever since neglected to pay its notes and other evidences of debt, and entirely suspended its ordinary and lawful business; and that another corporation with the same general object had, under the authority of the state, organized and was in actual operation in its place and stead; which facts were not denied in the answer, although the alleged forfeiture was attempted to be excused: *Held*, that it was a proper case for a judgment of forfeiture, dissolving the corporation, and restraining defendants, who were charged with usurping and attempting to exercise its franchise, from further exercising the same, &c.: *The People v. The Northern Railroad Co. et al.*, 53 Barb.

*Held also*, that the fact of insolvency and suspension of business being admitted in the answer, the law admitted no excuse for the forfeiture, nor was any explanation available: *Id.*

*Right to use Streets of a City—Subject to Regulations by the City.*—A grant to a corporation to carry passengers in cars over the streets of a city does not necessarily involve exemption from liability to municipal regulation. The right is neither greater nor less than a natural person possesses: *The Frankford and Philadelphia Passenger Railway Co. v. The City of Philadelphia*, 58 Penna.

When a corporation is authorized to carry on a specified business within a municipal corporation, it is intended that the business shall be conducted under the restrictions, &c., which govern others transacting the same business: *Id.*

A reasonable regulation of the use of a privilege is not a denial of the right: *Id.*

Corporations chartered to do business in a city are to be regarded as inhabitants of the city and, unless exempted, are subject to its ordinances: *Id.*

Liability to restrictions, &c., is involved in the designation of the place where the corporation's business is to be carried on: *Id.*

The right to construct and own a railway neither enlarges nor diminishes the right to run cars and carry passengers: *Id.*

An ordinance of Philadelphia requiring passenger cars to be numbered, to be licensed on paying a stipulated sum for each car, is a police regulation: *Id.*

Such ordinance may be enacted under the Act of April 15th 1850, authorizing the councils to pass ordinances for the regulation of omnibuses, &c.: *Id.*

Whether the ordinance could be enacted under the general power to councils to ordain such ordinances, &c., as shall be necessary for the government and welfare of the city, *dubatur*: *Id.*

*Forfeiture of Charter.*—It is no cause of forfeiture of a charter from Pennsylvania that the same corporation has obtained a charter from another state: *The Commonwealth ex rel. The Attorney-General v. The Pittsburgh and Connellsville Railroad Co.*, 58 Penna.

A corporation chartered by one state cannot transfer its allegiance by accepting a charter from another. It does not thus throw off its original

obligation, nor can it shelter itself under its new relation from any violation of its duties under its old one : *Id.*

All the rights of the Commonwealth against her own corporation will be enforced, without regard to immunities claimed from process beyond her territories and within the jurisdiction of another state : *Id.*

A corporation which undertakes to drag its sovereign to a foreign examination, before the bar of the tribunals of another state, violates its first and paramount duty and subjects itself to the extremest consequences : *Id.*

The Circuit Court of the United States is not the court of another sovereign to one of the states : *Id.*

A Pennsylvania corporation was incorporated also by Maryland, and as a Maryland corporation commenced suit against the Pennsylvania corporation to declare an Act of Assembly void. *Held*, that the corporation violated no duty to Pennsylvania : *Id.*

No mere intention of a corporation to violate its duty is a cause of forfeiture : *Id.*

The legislature is not the final judge of whether the *casus judicis*, upon which the authority to repeal a charter is based, has accrued : *Id.*

#### Covenant.

*Breach.*—The covenant to warrant and defend against all persons claiming the premises granted, by, from or under, certain persons named, is a covenant to warrant and defend against persons having valid claims, not pretences of claims without legal foundation and right : *Gleason v. Smith*, 41 Vt.

#### Debtor and Creditor. See Stamp.

*Attachment of Judgment.*—Fulmer & Co. held a policy of insurance against fire—a fire having occurred they brought suit on the policy : the attorney of Fulmer & Co. marked on the appearance-docket the suit for the use of Slate. Rowland recovered a judgment against the firm, and issued an attachment-execution making the insurance company garnishees. Slate was admitted to defend : the company made no defence. *Held*, that evidence was admissible to show, that making the judgment for the use of Slate was without authority of Fulmer & Co., and that it was to secure the individual debt of one partner : *Rowland v. Slate and Moyer*, 58 Penna.

An attorney at law has no authority as such to sell or assign the claim of his client : *Id.*

The entry made by the attorney was not part of the record : *Id.*

An assignment is not a judicial act but a matter *in pais* : *Id.*

#### Ejectment.

*Demand of Possession.*—To maintain ejectment, it must appear that there has been a disseisin of the plaintiff, as well as a wrongful possession by the defendant : *Chamberlin v. Donahue*, 41 Vt.

If the defendant is in possession with the plaintiff's permission and acquiescence, without claim of ownership or refusal to yield the possession, a demand of possession or request to quit in reasonable time is necessary in order to render the defendant's occupancy wrongful, and as constituting an ouster of the plaintiff : *Id.*

*Entry by License.*—To maintain ejectment, the plaintiff must establish that he is the owner of the premises in question, and lawfully entitled to the immediate possession of the same, and that the defendant was, at the time of the commencement of the action, in actual possession of said premises, and unlawfully and wrongfully withholds such possession from the plaintiff: *Pierce v. Tuttle*, 53 Barb.

An entry under a contract to purchase, is an entry by leave and license which, while it remains unrevoked, protects such possession as against an action of ejectment. A vendor cannot eject his own vendee who has entered by license, or under an express agreement giving him such possession, until such license is rescinded, or such agreement broken on the part of the vendee: *Id.*

But if the vendee is in default in making any of the payments, or in performing any of the conditions or covenants specified in the contract of sale, ejectment may be brought by the vendor, without any notice to quit or demand of possession: *Id.*

If the vendor, on the day appointed, offers to perform on his part, and tenders a deed for that purpose, but the vendee does not pay the purchase money or offer to do so, but refuses to receive the deed, this puts the latter in default; and the legal consequence of such default is, that it revokes the vendee's license to occupy the premises, and makes his occupation thereafter wrongful. The vendor may thereupon bring ejectment without giving any notice to quit: *Id.*

#### EMINENT DOMAIN.

The right of eminent domain, in the state, does not authorize the taking of property belonging to the public as a highway, and donating it to an individual: *The People ex rel. Failing v. The Commissioners of Highways of the town of Palatine*, 53 Barb.

#### EVIDENCE.

*Acts of Officers of United States—Certificates from Departments.*—The official character of persons acting in the capacity of mustering officers of the government during the rebellion, known to the whole community and recognised by the public at large, is *prima facie* to be assumed: *Chapman Township v. Herrold*, 58 Penna.

In an issue to determine whether the treasurer of a township was entitled to credit for bounties paid by him to volunteers, the mustering officers can prove their own acts and official papers, and persons who saw and heard the mustering officers taking in recruits and giving their official papers evidencing it, can give the evidence of these facts: *Id.*

The papers thus evidenced may be submitted to the jury: *Id.*

Certificates from the War Department of the mustering in of recruits are in no sense records importing absolute verity: *Id.*

*Boundary Line—Declarations of Deceased Person.*—The declarations of a deceased person as to the location of a disputed boundary, otherwise admissible, are not rendered inadmissible by the fact that they were made off the land, and because the line referred to was not actually pointed out or shown: *Powers v. Smith*, 41 Vt.

The question was which of two lines fourteen rods apart was the true range line. One survey of 5th division lots was made in 1806, and one



in 1808, and one of these lines was run in one and one in the other of said years, and the one run in 1808 was conceded to be the true line. In 1880, G., then an old man, since deceased, an original proprietor, and one of the committee appointed to procure the survey of 1808, and who made the report, as recorded, and for awhile, at an early day, the custodian of the proprietors' records and plans, living three or four miles from the 5th division lots, and having one in same range as defendants' lot assigned to him as one of the proprietors, told the witness while at G.'s house to make a copy of the plan of surveys made by direction of the proprietors, that when he should survey in the 5th division he would find the range lines between the lots, and that the west line was the true one: *Held*, that this declaration was admissible: *Id.*

#### EXECUTION.

*Levy not satisfaction of Judgment.*—The holder of a promissory note sued the maker and obtained judgment, upon which execution was issued and goods supposed to be the property of the maker levied on; sale was prevented by an interpleader. *Held*, that the levy was not a satisfaction of the judgment, and no defence to an action against the endorser of the note: *Rice v. Groff*, 58 Penna.

*Trustee Process—Promissory Note.*—The principle is well settled in this state, that a man cannot be made liable by a trustee process, for notes or securities which he holds for the benefit, and as agent, of another: *Smith adm. v. Wiley*, 41 Vt.

But where A gave his notes to B for the amount of B's claim against C, and took a deed from C of certain lands, under an agreement to sell them when he could advantageously, and apply the avails to pay A the amount of his notes to B, and the balance, if any, to be paid to C or for his benefit, and, after making some proper expenditures on said lands, A sold the same for a greater sum than the amount of his claim thereon, and took pay partly in notes secured by mortgage, both running to himself, which he held as his own property, and not as agent of C, which notes were good for their amounts, but had not been paid at the time of A's disclosure as trustee, it was *held*, that A was chargeable as trustee of C for the excess in the sale of said lands above A's said liabilities and expenditures, which he had paid, and which amounted to more than the cash he had received for said lands: *Id.*

*Process—Service—Trustee—Motion to dismiss.*—Where real estate is attached and the defendant does not reside in this state, and has no tenant, agent or attorney in this state, the act of the officer serving the writ, in leaving a copy in the office where by law a deed of such estate is required to be recorded, with a description of the property attached, for the purpose of making the attachment and creating a lien thereon, does not constitute notice to the defendant, but, in such cases, the statute, (General Statutes ch. 83, § 37,) requires another copy, having the officers' return thereon, to be left with the town clerk for the defendant, in order to complete the service and constitute notice to the defendant: *Washburn v. N. Y. and V. Mining Co., and Allen, Trustee*, 41 Vt.

There can be no judgment against a trustee, unless there is first a

judgment against the principal defendant, and where it is apparent that such judgment cannot be rendered, as in case of want of service upon the principal defendant, and he does not appear and submit to the jurisdiction of the court, the trustee ought not to be kept in court and the action will be dismissed on his motion : *Id.*

If the principal defendant waives the want of service upon him, or defects in the form of the proceedings, then the trustee cannot take advantage of such defects, or want of service : *Id.*

#### EXECUTORS AND ADMINISTRATORS.

*Power to create Charges upon Estate.*—An executor or administrator in this state, as a trustee of the estate, may create a charge upon it for expenses attending his administration, which he is authorized to incur in the proper discharge of his trust. Thus he may render the estate liable by contracting for suitable head-stones to be placed at the grave of the deceased, when there are sufficient assets properly applicable to that purpose : *Ferris v. Myrick*, 53 Barb.

An executor or administrator by ordering such articles as a part of the funeral expenses, makes himself personally liable for them ; but if he pay them himself, the estate is liable over to him for the amount : *Id.*

FRAUDS, STATUTE OF. See *Husband and Wife*.

GOLD COIN. See *Conflict of Laws*.

GUARANTY. See *Bills and Notes*.

After a guarantor of rent has become fixed and liable for rent in arrear, such liability can only be discharged by payment, release, or other satisfaction. It will not be discharged by a surrender of the unexpired term and the possession of the demised premises, by the lessees, without the knowledge or consent of the guarantor, upon an agreement that the lessor will release his claim for rent yet to accrue, but that such surrender shall not affect his claim for rent already due. JOHNSON, J., dissented : *Kingsbury v. Williams*, 53 Barb.

Such a case is not within the principle which discharges a surety upon the ground of a variation of the contract without his consent ; the remedies of the guarantor being in no way impaired or delayed by the surrender : *Id.*

#### GUARDIAN AND WARD.

*Liability of Guardian who deals with Trust Money as his own.*—A guardian received stocks as part of his ward's estate, sold them and kept his accounts as if he had the stocks. *Held*, that he was chargeable with the stocks at the highest rate they attained after the conversion : *Lamb's Appeal*, 58 Penna.

The guardian charged with expenses of audit, &c., and denied commissions in this case : *Id.*

#### HUSBAND AND WIFE.

*Witness—Evidence—Statute of Frauds.*—The plaintiff married the defendant's daughter, and the defendant claimed, that, after their mar-

riage, the plaintiff agreed to pay him for some articles of clothing which he had bought for his daughter before her marriage, with the understanding that she was to pay for them. This action of book account in which these articles of clothing were the items in dispute, was brought after the death of the plaintiff's wife: *Held*, that the defendant was a competent witness, the issue being upon the plaintiff's agreement with the defendant, not upon the deceased wife's agreement, though the latter was a material fact, bearing on the plaintiff's liability and defendant's right of recovery: *Cole v. Shurtleff and Trustee*, 41 Vt.

The design of the statute, Gen. St. Sec. 24, page 327, is to exclude a party from testifying when the other party to the contract in issue and on trial is dead, and when in the action such deceased party is represented by an executor or administrator, and contemplates a suit or proceeding, the determination of which may affect the estate of the deceased party: *Id.*

A naked parol promise of a husband made prior or during coverture, to pay an ante-nuptial debt of his wife, she not having been discharged or released from its payment, is within the statute of frauds, and cannot be enforced by action: *Id.*

The liability of a husband for the ante-nuptial debts of the wife, can only be enforced during coverture by a joint action against both. It terminates on the death of the wife, unless enforced during coverture by the recovery of a judgment: *Id.*

A parol promise of the husband during coverture to pay such debts made only in consideration of his existing liability, creates no new legal liability on him, but leaves such debts and the parties as they were before: *Id.*

A promise generally to pay on request what the promiser was liable to pay on request in another right, is without consideration and invalid: *Id.*

LEGAL TENDER NOTES. See *Conflict of Laws*.

MUNICIPAL CORPORATION. See *Corporation*.

#### PARENT AND CHILD.

*Contract—Soldier's Pay and Bounty.*—The plaintiff was the son of the defendant, and testified that while a minor he went out to work and his father told him he might have all he earned; that he afterwards enlisted in the army, while still a minor, with his father's consent and promise that whatever money he sent home should be his, the plaintiff's, and he would pay it to him, and testified in detail the amount he sent his father, and when, &c. The defendant claimed that the testimony of the plaintiff, if truthful, established only a state of facts from which the jury were at liberty to infer, or not to infer, such a relation as would entitle the plaintiff to recover; but the court instructed the jury that if they found the plaintiff's account of the matter, as stated in his testimony, was true, then their verdict should be for the plaintiff. *Held* that in this there was no error: *Ayer v. Ayer*, 41 Vt.

#### PARTNERSHIP.

*Dissolution.*—One partner may at any time withdraw and cause a

technical dissolution of the firm, subject to liability to his partners if the act be wrongful: *Slemmer's Appeal*, 58 Penna.

On the subject of dissolving partnerships, a large discretion is vested in courts of equity. Dissolution will not be decreed on slight grounds: *Id.*

Where a partnership can no longer be continued with comfort and advantage to all concerned, the court will consider not only the express contract of partnership, but also the duties and obligations implied in every partnership contract: *Id.*

Where a valuable business has grown up by the labors and contributions of all, the court should be careful to preserve it, and put all the partners on a fair and equal footing to compete for it: *Id.*

To appoint a receiver, direct a sale of the whole, and a winding up of the business, would destroy its value without benefiting either party: *Id.*

#### PATENT.

*Suits relating to Patents in State Courts.*—Where the question of the validity of a patent is directly involved the jurisdiction of the United States courts is exclusive: state courts have no cognisance either at law or in equity: *Henry T. Slemmer's Appeal*, 58 Penna.

When patent rights come into question collaterally, their validity may be inquired into by state courts: *Id.*

State courts can, either at law or in equity, enforce a contract or trust whose subject is a patent, if the validity of the patent is not directly in question, and may pass upon that when it arises *ex necessitate*, as in defence to an action on a contract: *Id.*

A joint patent taken out on the sole invention of one, or a sole patent on an invention of more than one, is void: *Id.*

Equity cannot decree an assignment of a patent on the ground, that the plaintiff and not the patentee is the original inventor: *Id.*

Mere suggestions or assistance from others will not invalidate the right of the patentee. To effect this the suggestions must furnish *all* the information to enable the alleged inventor to construct the improvement or use the new process completely and perfectly: *Id.*

It is not necessary to invalidate the right of the patentee that every minute thing about the invention should be communicated, but the substance must be: *Id.*

In a joint invention, each party should invent or discover something essential to the whole result: *Id.*

A patent is the reward granted by the public for the skill and ingenuity of the inventor: no one else can have the exclusive right; and he may assign it after the patent has issued: *Id.*

Within the limits prescribed by law, the inventor may grant the use of his invention before the patent is issued, provided he does not thereby forfeit his right or abandon his discovery to the public: *Id.*

If one employed by another, whilst receiving wages, experiments at the expense of his employer, constructs an invention, and permits his employer to use it, without compensation paid or demanded, and then obtains a patent, a license to the employer to use the patent will be presumed: *Id.*

#### PAYMENT.

*Note of a Third Person.*—An agreement by a creditor to take the

note of a third person in payment of his debt, with the actual transfer of the same, and a written acknowledgment that it is so taken without recourse on account of the creditor's claim, furnish sufficient grounds for the jury to find that the note was taken at the risk of the creditor. If so, the receipt of the note is a payment of the claim, and an extinguishment of the right of action thereon: *Roberts v. Fisher et al.*, 53 Barb.

#### PLEADING.

*Assignment—Chose in Action—Consideration.*—In an action by the assignee of a *chose in action* not negotiable, against the maker, upon a special promise to the plaintiff to pay him as assignee, the particular consideration for the transfer as between the plaintiff and the assignor need not be alleged in the declaration; it is enough if it is averred that by the transfer the plaintiff became the sole owner. Whether the transfer was by purchase for a valuable consideration, or by way of a gift, is immaterial to the validity of the defendant's promise, if thereby the plaintiff became the absolute owner: *Smiley v. Stevens*, 41 Vt.

#### STAMP.

*Judgment on Unstamped Bond.*—A judgment entered upon a bond not stamped is not void, and if erroneous, can be reached only by the defendant not by a creditor: *Ritter v. Brendlinger*, 58 Penna.

An assignee for the benefit of creditors takes the debtor's estate as a volunteer, his title must give way to a judgment, and unless by charging fraud, he cannot intervene to stay rightful proceedings on the judgment: *Id.*

#### STAY OF PROCEEDINGS.

A motion for a stay of proceedings in an action, on the ground that another suit is pending which embraces the same matters, will not be granted where the parties to the two actions are not the same, and it does not appear that the entire relief demanded and sought in the one action could be awarded in the other: *The People v. The Northern Railroad Co. et al.* 53 Barb.

Where the material allegations of the complaint in an action by the people against a corporation for its dissolution, are not denied by the answer, and it thus stands admitted of record that the corporation has forfeited and surrendered its charter and franchise, it would not be a proper exercise of judicial authority to stay the proceedings on the ground of another action pending, in which the corporation is plaintiff, the effect of which would be to prevent the entering of the judgment required by law to be awarded, and to permit the corporation to continue in the use of its corporate rights: *Id.*

#### TAX.

*Set off against Creditor of the Tax Payer—Tax—Contract—Trustee Process.*—Where the town summoned as trustee, was owing the defendant \$112 for professional services, and at the same time there was a town tax against the defendant unpaid of \$131.88, it was held that the town was not entitled to apply said tax upon said debt and thus avoid being held under the trustee process: *Johnson v. Howard, and Town of Thetford, Trustee*, 41 Vt.

A town tax is not a contract express or implied: *Id.*

As there was no perfected application of the debt upon the tax between the selectmen and the defendant, there were no equitable considerations in favor of the town: *Id.*

TRUSTEE. See *Guardian*.

VENDOR AND PURCHASER.

A vendee will not be deemed to have assented to a contract for the sale of land, which is binding on one of two vendors only. And the contract being, for that reason, not binding upon him at the time it was signed, he cannot make it a valid agreement as to one vendor only, by assenting to it as such a contract afterwards: *Snyder v. Neefus*, 53 Barb.

WITNESS. See *Husband and Wife*.

*Opinions.*—The general rule is that a witness must state facts, and not opinion; but it is not a universal rule, nor are the exceptions to the rule confined to experts on matters of science, art, or skill. Where the witness has had the means of personal observation, and the facts and circumstances which lead the mind of the witness to a conclusion, are incapable of being detailed and described so as to enable any one but the observer himself to form an intelligent conclusion from them, the witness is often allowed to add his opinion, or the conclusion of his own mind: *Town of Cavendish v. Town of Troy*, 41 Vt.

The claim being that said Thomas lived in Jay in 1829, the witness, 64 years old, always acquainted with Thomas, after detailing facts tending to show that he must know where Thomas was living that season, was allowed to say: "From what I have stated, I should not think it possible for Thomas to have lived in Jay that season, 1829, and I not know it." *Held*, there was no error: *Id.*

*Parties.*—The death of one party to the cause of action in issue, is the ground of excluding the survivor from testifying, and not the fact that the estate of the deceased party has an interest in the result of the suit. (Gen. Sts. ch. 36, § 24): *Hollister, adm. of Barrows v. Young*, 41 Vt.

The legal representatives of the intestate quitclaimed the premises in question, prior to the appointment of an administrator, and while the defendant was in adverse possession claiming title. The grantee brought ejectment in the name of the administrator. The question was whether the defendant had recognised the intestate's title during his life, and had occupied under and in subjection to it. *Held*, that the defendant was not a competent witness: *Id.*

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## CARRIERS BY WATER.

THE rights and responsibilities of the owners and carriers of goods transported by water are similar to those established by law in regard to carriers generally. The shipowners who employ their vessels as general ships, the packet and mail companies whose boats are regularly despatched on fixed and certain lines of travel, in a word, all whose regular business it is to carry goods by water for any one who may choose to employ them, are alike, in the absence of express or implied stipulations to the contrary,<sup>1</sup> held liable for all loss of or damage to the goods during the carriage, arising from whatever cause except the act of God (or, as it is sometimes called, inevitable accident), and the doings of the public enemy: 2 Redfield on Railways 4. And the same general principles, of course, regulate alike the rights, duties, and responsibilities of all carriers by land and by water. But as in practice

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<sup>1</sup> *McManus v. Lancashire Railway Co.*, 2 H. & N. 693; *Austin v. Manchester Railway Co.*, 10 C. B. 454; *Carr v. Lancashire Railway Co.*, 7 Exch. 707; *Wise v. Great Western Railway Co.*, 1 H. & N. 63; *Phillips v. Edwards*, 3 Id. 813; *Nicholson v. Willan*, 5 East 507; *Riley v. Horne*, 5 Bing. 217; *Parsons v. Monteath*, 13 Barb. 553; *Moore v. Evans*, 14 Id. 524; *Lee v. Marsh*, 43 Id. 102; *Fay v. Steamer New World*, 1 Cal. 348; *Stale v. Townsend*, 37 Ala. 247; *Cooper v. Berry*, 21 Ga. 526; *Laing v. Colder*, 8 Penn. St. 479; *Sager v. P., S., & P. Railroad Co.*, 31 Maine 228.



almost all maritime contracts of carriage are, to a greater or less extent, taken out of the rules of the common law, by the special terms of the bills of lading, charter-parties, or other contracts of affreightment, under which merchandise is almost invariably shipped, it is proposed in this article to consider solely some of the more important questions which have arisen, especially of late, under such contracts.

The office and effect of a common bill of lading have been fixed by numerous judicial decisions.<sup>1</sup> It properly consists of two parts: first, an acknowledgment of the receipt of certain goods in a specified condition; and, secondly, an engagement to transport and deliver the same to the consignee at the place of destination, on fixed terms and subject to certain conditions and limitations.<sup>1</sup> The contract, like all other written contracts, must be construed by its own language, and cannot be varied or explained by parol evidence,<sup>2</sup> although evidence of usage has been admitted to fix the meaning of such phrases as "the dangers of the seas;" *Gordon v. Little*, 8 S. & R. 553; *Sampson v. Gazzam*, 6 Port. 123; and as a general rule parol evidence may be received to determine the signification of the words used: *Steam Nav. Co. v. Silva*, 13 C. B. N. S. 616; *Bradley v. Dunipace*, 1 H. & C. 521. See *Chouteau v. Leech*, 18 Peun. St. 224; *Butler v. The Arrow*, 1 Newb. Adm. 59. The receipt, however, as between the original parties, is subject to such modification, and is to be regarded as *prima facie* evidence only against the carrier: *Sears v. Wingate*, 3 Allen 103; *Gowdy v. Lyon*, 9 B. Mon. 112; *Great Western Railroad Co. v. McDonald*, 18 Ill. 172; *Illinois Central Railroad Co. v. Cowles*, 32 Id. 117; *Blade v. Chicago Railroad Co.*, 10 Wisc. 4. But where the bill of lading has been endorsed for value to third parties, or where advances have been made or credit

<sup>1</sup> See *Dickerson v. Seelye*, 12 Barb. 99; *Dows v. Greene*, 16 Id. 72; s. c., 32 Id. 502; 24 N. Y. 638; *Dows v. Rush*, 28 Barb. 157; *Wolfe v. Myers*, 3 Sandf. 7; *Ward v. Whitney*, Id. 399; s. c., 4 Seld. 442; *Corill v. Hill*, 4 Denio 323; *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120; *Wayland v. Mosely*, 5 Id. 430; *O'Brien v. Gilchrist*, 34 Maine 554; *Knox v. The Ninetta*, Crabbe 534; *The Schooner Emma Johnson*, 1 Sprague 527; *Grove v. Brien*, 8 How. U. S. 429; *Bryans v. Nix*, 4 M. & W. 775.

<sup>2</sup> *Shaw v. Gardner*, 12 Gray 488; *Sayward v. Stevens*, 3 Id. 97; *Wolfe v. Myers*, 3 Sandf. 7; *Simmons v. Law*, 8 Bosw. 213; *White v. Van Kirk*, 25 Barb. 16; *May v. Babcock*, 4 Ohio 334; *Ind. Railroad Co. v. Remmy*, 13 Ind. 518; *Cox v. Peterson*, 30 Ala. 608; *The Schooner Reeside*, 2 Sumner 567.

given by third parties, acting *bond fide*, on the faith of the statements contained in this receipt, it becomes, to that extent at any rate, conclusive upon the carrier in favor of such third parties: *Sears v. Wingate*, 3 Allen 103; *Cox v. Peterson*, 30 Ala. 608; *Howard v. Tucker*, 1 B. & Ad. 512. The bill of lading is also *prima facie* evidence that the goods were, at the time of shipment, in the condition in which it describes them as being: *Nelson v. Woodruff*, 1 Black U. S. 156; *Ellis v. Willard*, 5 Seld. 529. See *Benjamin v. Sinclair*, 1 Bailey 174; *Hastings v. Pepper*, 11 Pick. 41; *Hill v. Sturgeon*, 35 Mo. 212; *Bradstreet v. Heran*, 2 Blatchf. C. C. 116. Of course, however, any such statements in the receipt as "contents unknown," or the like, would prevent such questions from arising against the carrier, even under ordinary circumstances, in favor of third parties; *The Columbo*, 19 Law Rep. 376; *Shepherd v. Naylor*, Id. 43; *Bissell v. Price*, 16 Ill. 104; *Ohrloff v. Briscall*, Law Rep. 1 P. C. 231; but in one case, where the bill of lading contained the clause, "weight, contents, and value unknown," and on delivery goods packed in cases were found to be injured, it was held that they would be presumed to have been properly packed and fit for transportation, unless there was something from which the contrary could be inferred: *English v. Ocean Steam Nav. Co.*, 2 Blatchf. C. C. 425. If the master signs a bill of lading for goods not delivered to the ship, the owners are not bound by this, even to *bond fide* endorsees of the bill, as it is not within the scope of the master's authority to subject the owners to responsibility for goods not received: *Grant v. Norway*, 10 C. B. 665; *Hubbersty v. Ward*, 8 Exch. 330; *Rowley v. Bigelow*, 12 Pick. 307. See *The Bark Edwin*, 1 Sprague 477; *Coleman v. Riches*, 16 C. B. 104. Nor is the vessel liable *in rem* by reason of such an acknowledgment: *The Bark Edwin*, 1 Sprague 477; *Schooner Freeman v. Buckingham*, 18 How. U. S. 182. But where, merely through inadvertence, the bill of lading is signed before the goods are on board, but upon the faith and assurance that they are at hand and ready to be shipped, and afterwards they actually are shipped, then, as against the shipper and master, the bill of lading may operate upon these goods by way of relation and estoppel: SHAW, C. J., in *Rowley v. Bigelow*, 12 Pick. 307.

The contract of a bill of lading usually is, to deliver the goods at the port of destination, to the consignee or his assigns, he or

they first paying the freight or other customary charges thereon, and with an exemption from liability for certain perils. In this, the only points calling for special attention are, the exception of responsibility for certain risks; the provision for delivery to the assigns of the consignee or endorsees of the bill of lading; and the stipulation for prior payment of the charges for transportation.

The carrier is not to be charged for any loss or injury arising solely from the excepted risks. And the exceptions specially contracted for are in addition to those made by law to the responsibility of all carriers; thus, under a bill of lading which excepts the dangers of the seas only, the carriers are not responsible for a loss by the public enemy.<sup>1</sup> Under an exception of liability for detention of a ship by ice, where lighterage was necessary to load the ship, a detention of the ship from the lighterage being delayed by ice, was held to be excused: *Hudson v. Edes*, Law Rep. 2 Q. B. 566; s. c., 3 Id. 412. But an agreement to load a full cargo upon a ship, "fire excepted," is not discharged by the ship catching fire when part of the cargo is on board and the rest at the ship's side, though the ship was scuttled to put out the fire, and the master afterwards sold the part of the goods thus damaged, and forwarded the remainder by another vessel: *Jones v. Holm*, Law Rep. 2 Exch. 335. And a snow storm is not included in an exception of riots, strikes, or any other accident beyond the contractor's control: *Fenwick v. Schmalz*, Law Rep. 3 C. P. 313. Fire is not, and cannot be made by usage, a peril of the seas: *Garrison v. Memphis Ins. Co.*, 19 How. U. S. 312. But see *Gordon v. Little*, 8 S. & R. 553; *Sampson v. Gazzam*, 6 Port. 123; *Steam Nav. Co. v. Silva*, 13 C. B. N. S. 616; *Bradley v. Dunipace*, 1 H. & C. 521. So, where the cargo of a steam-vessel was damaged by water escaping from the pipe of a boiler which had been cracked by frost, this was held not to be the act of God, but the result of negligence on the part of the captain in filling his boiler over night; and a custom to fill the boiler over night was

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<sup>1</sup> *Gage v. Turell*, 9 Allen 299. But in this case it appeared that there was a previous written contract for the carriage of the goods, containing no clause affecting the carrier's responsibility; and the bill of lading sued on was given merely to furnish the usual shipping documents for transmission; and the court lay some stress on this fact: BEELOW, C. J., citing *Lamb v. Parkman*, 1 Sprague 343; *Morrison v. Davis*, 20 Penn. St. 117.

held to be no excuse: *Siordet v. Hall*, 4 Bing. 607. But under the usual exception of perils of the seas, the shipowner is not responsible for an injury resulting from his vessel having run foul of another through misfortune; *Buller v. Fisher*, 3 Esp. 67; *Jones v. Pitcher*, 3 Stew. & P. 176; or the fault of such other vessel: *Smith v. Scott*, 4 Taunt. 126. See *Vennall v. Garner*, 1 Crompt. & M. 21; *Rigby v. Hewitt*, 5 Exch. 240.

If sufficient care, in view of all the risks, whether excepted or not, was not used, this is negligence for which the carrier will be answerable: *Muddle v. Stride*, 9 Car. & P. 380. The carrier has no right to load the goods on deck, unless authorized by the custom of the particular trade (of which, when established, the owner will be taken to be conusant), or by the agreement of the parties; and for any breach of his duty in this regard he is, of course, liable: *Barber v. Brace*, 3 Conn. 9; *Waring v. Morse*, 7 Ala. 343. And where goods are carried on deck by such authority, the rights and responsibilities of the carrier are the same as if they had been stowed in the hold; *Gould v. Oliver*, 4 Bing. N. C. 134; s. c., 5 Scott 445; *Smith v. Wright*, 1 Caines 43; *Baxter v. Leland*, 1 Abbott Adm. 348; except that the shipper must bear the risk of all perils arising from the mode of stowage which he has himself authorized; *Lawrence v. Minturn*, 17 How. U. S. 100; *Dodge v. Bartol*, 5 Greenl. 286. Where the goods were seized as contraband under the laws of a foreign country, other than that in which the goods had been shipped or to which the vessel belonged, and were condemned by legal process in the foreign courts, but it did not appear that there had been any wrongful act or neglect on the part of the owner of the goods, or any knowledge on his part that they were contraband in such foreign country, it was held that the loss proceeded from an inevitable necessity, for which the carrier must be held liable, in the absence of any stipulation to the contrary: *Spence v. Chadwick*, 10 Q. B. 517. See also *Howland v. Greenway*, 22 How. U. S. 491; *Schieffelin v. Harvey*, 6 Johns. 170. In *Lloyd v. Guibert*, Law Rep. 1 Q. B. 115, it was held that unless otherwise provided in the contracts, the law of the country to which the ship belongs must govern in all such agreements. In this case the bill of lading excepted only the act of God and the dangers of the seas. Moisture or dampness is a peril of the seas for which the carrier will not be liable, there being no defect in the ship or

in the manner of loading the goods, unless it might have been prevented or remedied by reasonable skill and diligence on his part. And where any loss or injury proceeds from a principle of decay existing in the commodity itself, even though excited into action by the unavoidable close confinement of the ship, the shipper must bear the loss, unless the usual and proper precautionary measures have been omitted by the carrier: See 2 Redfield on Railways 127 (§ 168 of 3d ed.), and cases cited. And generally it may be said that a carrier by water is bound to provide a ship sufficiently well furnished in all respects for the voyage contemplated, well manned, and supplied with all needful sails, anchors, and other equipage; and for failure in all or any of these respects he is liable. See *Bancroft v. Hussey*, 2 Const. Ct. 114; *Bell v. Reed*, 4 Binn. 127; *Dickinson v. Haslett*, 3 Har. & J. 345. This being first done, he cannot afterwards be made liable for any excepted risk, unless it arise from some wrongful or negligent act or omission of himself or his servants: *Ohrloff v. Briscoe*, Law Rep. 1 P. C. 231; *Phillips v. Clarke*, 2 C. B. N. S. 156; s. c., 5 Id. 881; *Steamboat Co. v. Basin*, Harp. 262; *Williams v. Grant*, 1 Conn. 487; *Gordon v. Buchanan*, 5 Yerg. 71. Where damage or loss of the goods is shown, the burden is on the carrier to show that it occurred from an excepted risk; *The Ship Martha*, Olcott Adm. 140; *The Huntress*, Daveis 82; *The Emma Johnson*, 1 Sprague 527; *The Zone*, 2 Id. 19; *McManus v. Lancashire Railway*, 4 H. & N. 327; *The Rappahannock v. Woodruff*, 11 La. An. 698; *Edwards v. Steamer Cahawba*, 14 Id. 224; but when this appears to be the case, the burden is generally taken to be on the shipper or owner of the goods to prove some negligence that will render the carrier liable; *Hunt v. Propeller Cleveland*, 1 Newb. Adm. 221; s. c., 6 McLean C. C. 76; *Ohrloff v. Briscoe*, Law Rep. 1 P. C. 231; *Thomas v. The Morning Glory*, 13 La. An. 269; *The May Queen*, 1 Newb. Adm. 464; *Nav. Co. v. Shand*, 4 Moo. P. C. N. S. 272; though this has been doubted: *Tardos v. The Toulon*, 14 La. An. 429; *Roberts v. Riley*, 15 Id. 103; *Phillips v. Edwards*, 3 H. & N. 813; *Berry v. Cooper*, 23 Ga. 543; *Muddle v. Stride*, 9 Car. & P. 380.

The bill of lading, as it provides for a delivery of the goods to the order or assigns of the consignee, is regarded as a quasi negotiable instrument; *Fox v. Nott*, 6 H. & N. 630; *Lickbarrow v. Mason*, 1 Smith's Lead. Cas. 388, and notes; and the endorsee

takes all the rights of the original consignee, and sometimes, as we have seen (*Sears v. Wingate*, 3 Allen 103; *Howard v. Tucker*, 1 B. & Ad. 512; as to special endorsements, see *Gibbs v. Potter*, 10 M. & W. 70), even greater rights, inasmuch as he may generally regard the receipt as conclusive upon the carrier. And the right of stoppage in transitu is defeated by a previous *bond fide* endorsement and delivery of the bill of lading for value: *Lickbarrow v. Mason*, *supra*. The endorsee, under the present English statute, 18 & 19 Vict. c. 111, takes by transfer all vested or contingent rights of action, even though the goods are no longer at sea: *Short v. Simpson*, 12 Jur. N. S. 258; *Lewis v. M'Kee*, Law Rep. 2 Exch. 37; *Smurthwaite v. Wilkins*, 11 C. B. N. S. 842.

Unless there is an agreement to the contrary, the carrier may look for payment of the agreed charges to the shipper named in the bill of lading, although he does not own the goods, and the carrier has waived his lien thereon: *Wooster v. Tarr*, 8 Allen 270; *Blanshard v. Page*, 8 Gray 281; *Barker v. Havens*, 17 Johns. 234; *Layng v. Stewart*, 1 W. & S. 222; *Tapley v. Martens*, 8 T. R. 451; *Holt v. Westcott*, 43 Maine 445. *Tobin v. Crawford*, 9 M. & W. 716, *contra*, seems to have gone on the ground that the plaintiff had given credit to the endorsee of the bill of lading. And the consignee, or the endorsee of the bill of lading, to whom the goods are delivered at his request, impliedly contracts to pay the freight thereon (*Meriam v. Funck*, 4 Denio 110; *Dougal v. Kemble*, 3 Bing. 383; *Scaife v. Tobin*, 3 B. & Ad. 523; but see *Sanders v. Vanzeller*, 4 Q. B. 260), the consideration of the promise being the delivery of the goods; *Kemp v. Clark*, 12 Q. B. 647; see *Coleman v. Lambert*, 5 M. & W. 502; but the consignee cannot be made personally liable for general average, although before receiving the goods he has had notice that they have become subject to that charge, where the bill of lading does not make the payment of general average a condition precedent to the delivery of the goods: *Scaife v. Tobin*, 3 B. & Ad. 523. And any consignee, even though an intermediate one, has by virtue of his character as such, the right to adjust and settle a claim for damages to a part of the property: *Davis v. Patterson*, 24 N. Y. 317. But a neglect on the part of the carrier to enforce his claims against the consignee, whereby the shipper is injured, may release the shipper from liability:

*Thomas v. Snyder*, 39 Penn. St. 317; *Tobin v. Crawford*, 9 M. & W. 716; but see, per BIGELOW, C. J., 8 Allen 272. The ship has also a lien upon the goods for freight, both under the usual provisions of the bill of lading and by the general principles of the law of carriers; *Skinner v. Upshaw*, 2 Ld. Raym. 752; and this lien covers also charges for previous transportation: *Bissell v. Price*, 16 Ill. 408; *Lee v. Salter*, Lalor's Sup. to Hill & Denio 163. But any damage to the goods, for which the carrier is liable, may be recouped from the freight; and the goods can be held only for the balance.<sup>1</sup> But the master must tender the goods as ready for delivery on payment of the freight; *Palmer v. Lorillard*, 16 Johns. 356; *Lanata v. Grinnell*, 13 La. An. 24; and if he demand more than is due, he or his agents are liable in trover as for a conversion of the goods, the owner being ready to pay the proper amount; and a formal tender of the amount due is unnecessary: *Adams v. Clark*, 9 Cush. 215; *Isham v. Greenham*, 1 Handy 357. And it has been said that the relation of debtor and creditor must subsist between the owner of the goods and the carrier, so that an action at law might be maintained for the payment of the debt sought to be enforced: *Fitch v. Newbury*, 1 Doug. Mich. 1. And possession is necessary to the existence of every lien strictly so called; so that if the goods are once delivered, the lien is waived: *Boggs v. Martin*, 13 B. Mon. 248; but a delivery obtained by fraud, and probably one by mistake, if no rights of *bonâ fide* purchasers have intervened, will not cause a waiver of the lien: *Bigelow v. Heaton*, 6 Hill 43; s. c. 4 Denio 496; *Hays v. Riddle*, 1 Sandf. 248. And the lien is also destroyed by accepting security for the future payment of the freight, or by agreeing to postpone the time of payment until after the delivery of the goods, *Crawshay v. Homfray*, 4 B. & Ald. 50, the rule being that where the agreed mode of payment is inconsistent with the existence of a lien, that will be regarded as waived: 3 Kent Com. 221; *The Schooner Volunteer*, 1 Sum-

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<sup>1</sup> *Snow v. Carruth*, 1 Sprague 324; *Bartram v. McKee*, 1 Watts 39; *Hill v. Leadbetter*, 42 Maine 572; *Fitchburg and Worcester Railroad Co. v. Hanna*, 6 Gray 539; *Edwards v. Todd*, 1 Scammon 462; *Humphreys v. Reed*, 6 Whart. 435; *Leech v. Baldwin*, 5 Watts 446. In England the rule is different; and any damage to the goods can be recovered for only by cross action: *Davidson v. Gwynne*, 12 East 380; *Shields v. Davis*, 6 Taunt. 65; *Gibson v. Sturge*, 10 Exch. 622; Lord CAMPBELL, C. J., in *Thompson v. Gillespie*, 5 El. & Bl. 209.

ner 551; *Raymond v. Tyson*, 17 How. U. S. 53; *Olsager v. St. Katherine's Dock*, 14 M. & W. 794; *Foster v. Colby*, 3 H. & N. 705; *Kirchner v. Venus*, 12 Moore P. C. 361; *The Bird of Paradise*, 5 Wall. U. S. 481. This lien is favored by the law, and will not be overthrown unless the facts are clearly inconsistent with its maintenance: STORY, J., in *Certain Logs of Mahogany*, 2 Sumner 589; WARE, J., in *Drinkwater v. Brig Spartan*, 1 Ware 158; *The Schooner Volunteer*, 1 Sumner 551, 570; *Howard v. Macondray*, 7 Gray 516; *Clarkson v. Edes*, 4 Cow. 470. The lien includes only the charges for transportation, *Steamboat Virginia v. Kraft*, 25 Mo. 76; and cannot be extended to cover the expenses of keeping the chattels detained: *Somes v. British Empire Shipping Co.*, 6 Jur. N. S. 761; but where the consignee refused to pay freight until after the goods were placed in his store, and the shipper thereupon stored them in a warehouse, subject to his own order, giving notice to the consignee, it was held that the shipowners were not accountable for the subsequent misconduct of the warehouseman: *The Eddy*, 5 Wall. U. S. 481. And it is now well settled that where goods are received for transportation from a wrongdoer, without any knowledge or consent of the rightful owner, the carrier cannot set up any lien for freight as against the real owner; *Buskirk v. Purington*, 2 Hall 261; *Stevens v. Boston & Worcester Railroad Co.*, 8 Gray 262; *Ames v. Palmer*, 42 Maine 197; inasmuch as carriers are not bound to receive goods from any but the rightful owners, nor without taking payment in advance: FLETCHER, J., in *Stevens v. Boston & Worcester Railroad Co.*, *supra*. Such charges as dead freight, demurrage, or general average, may be made a lien upon the cargo by agreement; but it has been held that where, by charter-party, a vessel was to be loaded and despatched with all speed, freight payable on delivery, and the charterer's liability to cease upon shipment of the cargo, if the cargo was worth the freight upon arrival at the port of discharge, the cargo to be subject to a lien for freight, dead freight, or demurrage, which lien the master was bound to enforce,—the cargo being worth the freight when it reached the port of destination, the shipowners could not hold the charterers liable for delay in loading the vessel: *Bannister v. Breslauer*, Law Rep. 2 C. P. 497; *Scaife v. Tobin*, 3 B. & Ad. 523.

Freight is not earned unless the goods are carried to the port



of destination: *Benner v. Equitable Safety Ins. Co.*, 6 Allen 222; *Cook v. Jennings*, 7 T. R. 381; *Welch v. Hicks*, 6 Cow. 504; *Cage v. Baltimore Ins. Co.*, 7 Cranch 358; and the same rule applies to the carriage of passengers: *Howland v. Brig Lavinia*, 1 Pet. Adm. 123. See *Bonsteel v. Vanderbilt*, 21 Barb. 26; *Leman v. Gordon*, 8 Car. & P. 392; *Muloy v. Becker*, 5 East 316. And freight or passage-money paid in advance may be recovered back, if the vessel is lost or the voyage abandoned before reaching its destination: *Benner v. Equitable Safety Ins. Co.*, 6 Allen 222, without the fault of the shipper or passenger: *Griggs v. Austin*, 3 Pick. 20; *Detouches v. Peck*, 9 Johns. 210. But if the owner of goods voluntarily receives them at a place short of their destination, freight *pro ratâ itineris* is due: *Cage v. Baltimore Ins. Co.*, 7 Cranch 358; *Rossiter v. Chester*, 1 Doug. Mich. 154. But if the master refuses to repair the ship, or to send on the goods, this is not of itself such a voluntary acceptance as will render him liable for freight *pro ratâ*; and the *bona fides* of a subsequent offer by the master to repair and complete the voyage is a question for the jury: *Welch v. Hicks*, 6 Cow. 504; *Cage v. Baltimore Ins. Co.*, 7 Cranch 358. The owners of goods are deemed to have accepted them voluntarily at an intermediate port, when, knowing that the voyage has been abandoned, its further prosecution having become impossible or extremely hazardous, they then demand the same of the agents of the forwarders with whom the goods have been stored, at the same time tendering the charges for storage: but see *Somes v. Br. Em. Ship. Co.*, 6 Jur. N. S. 761; and bring replevin to recover the goods on the refusal of the agents to deliver them: *Rossiter v. Chester*, 1 Doug. Mich. 154. And the consignee must bear the expense of further transportation after he has voluntarily accepted the goods at an intermediate port: *Reed v. Dick*, 8 Watts 479. A reservation in the bill of lading of the privilege of reshipment does not vary the carrier's liability for the safe delivery of the goods: *Little v. Semple*, 8 Mo. 99; *Whitesides v. Russell*, 8 W. & S. 44. If the shipper, after the goods have been delivered to the master for transportation, but before the commencement of the voyage, wrongfully removes them, he is liable for the stipulated freight, less the substituted freight which the shipowner either has actually made, or by the use of due diligence might have made, on that voyage: *Baily v. Damon*, 3 Gray 92. And

if a bill of lading has been given, the shipper must also indemnify the master or owner for the difference, if any, between the value of the goods when shipped and the amount which he may be compelled to pay to an assignee of the bill of lading: *Bartlett v. Darnley*, 6 Duer 194.

Disputes have sometimes arisen as to the amount of freight to be paid, generally either from a variation in the measurement of the cargo, or else from a discrepancy between the charter-party or other written contract of affreightment and the bill of lading. In one case a vessel agreed to carry a cargo of cotton at an agreed rate "per ton of fifty cubic feet delivered." Previously to being loaded the cotton had been subjected to a high pressure, and so expanded considerably on being taken from the ship; whereupon the shipowners claimed freight according to the measurement when delivered. A custom was proved to pay freight, under such circumstances, according to the measurement when shipped; and it was held that, independently of such custom, freight was demandable only on the measurement shipped: *Buckle v. Knoop*, Law Rep. 2 Exch. 125 & 333; s. p. in *Gibson v. Sturge*, 10 Exch. 622. In these cases, had the cargoes shrunk instead of expanding, there can be no doubt that the ship would not have been liable to deliver more than it had received. In another late case a shipowner at L. requested the defendants to purchase goods for him at C.; and as the goods were to be on the owner's account he consented to a nominal rate of freight being inserted in the bills of lading. Before the order was completed he transferred the ship to the plaintiffs; but neither the defendants nor the shipmaster had any notice of this transfer. The defendants accordingly procured and shipped the goods; and the master signed bills of lading therefor, with the clause, "Freight on said goods free on owner's account." Before the vessel arrived the consignee stopped payment, and the defendants thereupon claimed to stop the goods *in transitu* without paying anything for freight. Held, that they were not liable for any freight: *Mercantile Bank v. Gladstone*, Law Rep. 3 Exch. 233. Although the price named in the bill of lading is generally conclusive, *Foster v. Colby*, 3 H. & N. 705, *Palmer v. Gracie*, 4 Wash. C. C. 410, yet one party is not bound by it where the other knew that the master had no right to insert such a rate: *Barnard v. Wheeler*, 24 Me. 412.

The mortgagee of a vessel, who intervenes by taking possession,

or, where that is impossible, by giving notice to the mortgagor and the charterers before the freight is payable, but after it is earned, is entitled to the freight as against the assignee in bankruptcy of the mortgagor: *Rusden v. Pope*, Law Rep. 3 Exch. 269. The general question of the priority of claims has been much discussed in some late English cases; *The Great Eastern*, Law Rep. 2 Adm. & Ecc. 88; *The Feronia*, Id. 65; *The Scio*, 1 Id. 358; *The Edward Oliver*, 1 Id. 379; *Brown v. Tanner*, Law Rep. 3 Ch. 597; *Bell v. Blyth*, Law Rep. 6 Eq. 201.

As the right of lien upon the goods carried depends upon possession, it often becomes important to determine whether, under a charter-party, the possession and control of the ship remain in the general owners, or have passed to the charterers, who thus become owners for the voyage, or *pro hac vice*: *Sandeman v. Scurr*, Law Rep. 2 Q. B. 86; *Trinity House v. Clark*, 4 M. & S. 288; *Colvin v. Newberry*, 1 Cl. & Fin. 283; *Dean v. Hogg*, 10 Bing. 345; *Lucas v. Nockells*, 4 Bing. 729; *Reynolds v. Toppan*, 15 Mass. 370; *Pickman v. Woods*, 6 Pick. 248; *Drinkwater v. The Spartan*, 1 Ware 149; *Pitkin v. Brainard*, 5 Conn. 451; *Emery v. Hersey*, 4 Greenl. 407; *Clarkson v. Edes*, 4 Cow. 470; *Schooner Argyle v. Worthington*, 17 Ohio 460; *Holmes v. Pavenstedt*, 5 Sandf. 497; *McLellan v. Reed*, 35 Maine 172; *Eames v. Cavaroc*, 1 Newb. Adm. 528; *The Golden Gate*, Id. 308; *The Aberfoyle*, 1 Abbott Adm. 242. In one case it was provided that the ship should receive on board at London all such goods as the freighter thought fit to load, proceed therewith to Madras, there deliver the outward cargo, receive from the freighter's agents a homeward cargo, and deliver the same in London. All the cabins but one, which was reserved for the captain, to be at the disposal of the freighter, who was to appoint the supercargo; the captain and crew were employed and paid by the owners. The court held that as there were no actual words of demise in the charter-party, the possession remained in the general owners: *Saville v. Champion*, 2 B. & Ald. 503. But in another case, although the charter-party did contain express words of present demise, yet taking the whole instrument into consideration, it was held that the possession did not pass to the freighters, but remained in the general owners: *Christie v. Lewis*, 5 Moore 211; s. c. 2 Brod. & B. 440. And the general rule is to follow the

intention of the parties, as they have expressed it in their written contracts.

The principal questions that have arisen in regard to passenger-carriers by water have concerned the treatment of the passengers by the officers of the ship. The master of the vessel is liable for any injury to a passenger caused by his negligence or wrongful act, either towards the passenger or in the management of the ship: *Nieto v. Clark*, 1 Cliff. C. C. 85; *Chamberlain v. Chandler*, 3 Mason 242; *Young v. Fewson*, 8 Car. & P. 55; *Boyce v. Bayliffe*, 1 Camp. 58; *Malton v. Nesbitt*, 1 Car. & P. 70. The ship is bound to furnish a good and sufficient supply of provisions; but an action for breach of this duty will not be sustained except for a real grievance: *Young v. Fewson*, 8 Car. & P. 55; *The Aberfoyle*, 1 Blatchf. C. C. 360. The captain may exclude passengers from the cabin-table for ungentlemanly conduct, though it would be hard to define the precise degree of want of polish which would justify such exclusion: *Prendergast v. Compton*, 8 Car. & P. 454. For an unlawful exclusion, the captain is liable: *Ibid.* And conversely, the passengers are entitled to courteous and proper treatment from the officers and crew of the vessel: *West v. Steamer Uncle Sam*, 1 McAll. C. C. 505; *Chamberlain v. Chandler*, 3 Mason 242; see *McGuire v. Steamship Golden Gate*, 1 McAll. C. C. 104. There is some doubt as to the extent of the authority of the captain of a merchant vessel to imprison a passenger for refusing, upon the approach of an enemy, to take the post assigned him: *Boyce v. Bayliffe*, 1 Campb. 58. But a passenger, by reason solely of his character as such, is under no such obligation to the ship as will deprive him of the right to recover for meritorious salvage services performed by him: *Newman v. Walters*, 3 Bos. & P. 612. But the services must be extraordinary. See 2 Parsons, Shipping & Admiralty, 2d ed., 268, note 5. A passenger assaulted by the shipmaster, has his remedy against the shipowners; but he can recover only his actual, and not vindictive damages: *McGuire v. Steamship Golden Gate*, 1 McAll. C. C. 104; *Pearson v. Duane*, 4 Wall. U. S. It has been held that the sale of a passage-ticket by a certain steamer does not constitute an unconditional contract to carry the person purchasing such ticket by that steamer; and if at the time of the sale, and without the knowledge of either party, the steamer was lost at sea, the holder of the ticket can recover no more than he paid

therefor: *Bonsteel v. Vanderbilt*, 21 Barb. 26; *Briggs v. Same*, 19 Id. 22; *Williams v. Same*, 29 Id. 491. See *Williams v. Vanderbilt*, 28 N. Y. 217; *West v. Steamer Uncle Sam*, 1 McAll. C. C. 505.

In some cases the liability of shipowners has been limited by statute to the value of the ship and freight at the time of the loss or injury: 7 Geo. 2, c. 15; 26 Geo. 3, c. 86; 53 Geo. 3, c. 159; 17 & 18 Vict. c. 104, § 503; 25 & 26 Vict. c. 63, § 54; 9 U. S. Stats. at Large 635; Mass. Gen. Stats. c. 52, §§ 18-21; Maine Rev. Stats. (1857), c. 35, §§ 5 & 6.

In a late case (*Duckett v. Latterfield*, Law Rep. 3 C. P. 227; see 13 C. B. N. S. 616) in England, it appears that by charter-party the charterer agreed to load a full and complete cargo of sugar in cases, or other lawful merchandise, at a certain rate per ton for sugar, and for other produce a rate proportionate to sugar in casks with sufficient bags, agreeably to the custom of the port for loading. The charterer loaded a full cargo of cotton, with sixty-one tons of stone for ballast, which would have been unnecessary if sugar had been loaded: Held, that a full cargo had been loaded, and that the charterers were not bound to furnish any bags for broken stowage with this cargo: *Ibid.* And under a charter-party, providing that a ship should proceed to a certain port "with all convenient speed, on being ready," delay for a few days from a deviation, unaccompanied by any serious loss to the freighters, does not justify them in abandoning the contract: *McAndrew v. Chapple*, Law Rep. 1 C. P. 643.

H. N. S.

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#### RECENT AMERICAN DECISIONS.

##### *Supreme Judicial Court of Maine.*

##### AMELIA A. KNIGHT v. THE PORTLAND, SACO, AND PORTSMOUTH RAILROAD COMPANY.

A through ticket over three several distinct lines of passenger transportation, issued in the form of three tickets on one piece of paper, and recognised by the proprietors of each line, is to be regarded as a distinct ticket for each line.

The rights of a passenger purchasing such a ticket, and the liabilities of the proprietors of the several lines recognising its validity, are the same as if the purchase had been made at the ticket office of the respective lines.

Common carriers of passengers are not bound to insure the absolute safety of their passengers; but they are required to exercise the strictest care consistent with the reasonable performance of their contract of transportation.

To render them liable for an injury to a passenger while under their charge, it is enough if it was caused solely by any negligence on their part, however slight, if, by the exercise of the strictest care and precaution, reasonably within their power, the injury would not have been sustained.

Where the plaintiff's ticket entitled her to a passage over the defendants' road to Portland, and by steamboat from Portland to Belfast; and the defendants had built their track upon their wharf down to the steamboat, and had run their passenger train upon it for a time, and still continued to run their baggage train there; and they directed their passengers verbally, or by printed sign, to use the wharf as a passage-way to the boat, and they did so use it; and they made the wharf subsidiary and necessary to the proper use and enjoyment of their road; in an action by the plaintiff to recover for an injury upon the wharf:—*Held*,

1. That the defendants are bound to exercise the same degree of care, in making the wharf safe and convenient for their through passengers to travel over, as is required of common carriers of passengers, although they required them to disembark at their depot, forty rods distant from the steamboat; and,

2. That this liability continued until, in the ordinary course of their passage over the wharf, they reached the point where the liability of the steamboat company commenced.

ON exceptions, and motion to set aside the verdict as being against the weight of evidence and excessive in amount of damages.

Case, for injury received at the slip on the defendants' wharf in Portland.

The defendants requested the presiding judge to instruct the jury:—

1. That the defendants were under no obligations to carry the plaintiff beyond the point at which they regularly received and discharged passengers in Portland:

2. That, when they had safely carried the plaintiff from their station in Berwick to their station in Portland, and had safely delivered her from their depot in the latter place, their duty as carriers of passengers ceased:

3. That the wharf in Portland, used by the steamboat company for the purposes of its business, though owned by the defendants, was not such a part of the appliance of the defendants' railroad as the defendants, in their capacity of carriers of passengers, are responsible for the condition of:

4. That, if the jury should find that a slip or drop was necessary for the transaction of the business of the wharf, and it was

constructed in the best known manner and with all usual and reasonable precautions for safety, and had no unreasonable or improvident space for its movement, but only sufficient for its easy and convenient operation, then the defendants have been guilty of no laches and cannot be held in this action.

The presiding judge declined to give the first three requested instructions, but gave the fourth, with this addition:—"but, if the space between the wharf and slip, though necessary to be kept open for the movement of the slip in raising it or letting it down, did not need to be kept open while in actual use for passengers to pass over, and the care required for common carriers of passengers rendered it necessary that it should be closed or guarded on such occasions, and the accident was caused wholly by the neglect of the defendants to close it or to provide all reasonable safeguards against passengers stepping into it, the defendants would be liable."

But the jury, together with other things not objected to, were instructed as follows:—

Common carriers of passengers are required to exercise the strictest care which is consistent with the reasonable performance of their contract of transportation.

While they are not bound to insure the absolute safety of their passengers, they are required to make use of such safeguards for the protection of their passengers as science and art have devised, and as experience has proved to be efficacious in accomplishing their object.

It is not sufficient that they exercise slight, common, or even great care.

They have discharged their duty only when they have employed all the means reasonably in their power to prevent accident.

To render them liable for an injury to passengers while under their charge, it is not necessary that they be guilty of gross or great negligence; it is enough if the accident was caused solely by any negligence on their part, however slight, if, by the exercise of the strictest care or precaution, reasonably within their power, the injury would not have been sustained.

That the arrangements between the several connecting companies, by which each sold tickets through, only imposed on each

the obligation to carry passengers over its own portion of the entire route.

If the plaintiff purchased a through ticket to Belfast at Lawrence, and the defendants recognised the validity of that ticket by passing her over their road, they took upon themselves the duties and responsibilities of common carriers of passengers as effectually as if the ticket had been purchased at their office in Berwick.

The plaintiff's ticket entitled her to a passage over the defendants' road to Portland, and, by steamboat, from Portland to Belfast; and, if the defendants built their track down to the steamboat upon the wharf, running their passenger train down upon it for a time, and their baggage train there at the time of the accident; and, if they directed their passengers verbally or by a printed sign to use the wharf as a passage-way to the boat, and they did so use it, and, if they made the wharf subsidiary and necessary to the proper use and enjoyment of their road, they are bound to exercise the same degree of care in making the wharf safe and convenient for passengers to travel over, which is required of common carriers of passengers, though at the time of the accident they detained their passenger train at their depot, and required their passengers to disembark at that place.

The jury, under these instructions and others not excepted to, returned a verdict for the plaintiff, and assessed damages at \$2500, and the defendants alleged exceptions.

The principal facts testified to by the plaintiff appear in the opinion.

*Nathan Webb*, for the defendants, cited *Schopman v. Boston and Wor. Railroad Co.*, 9 Cush. 24; *Sprague v. Smith*, 29 Vt. 421; *Hood v. N. Y. & N. Haven Railroad Co.*, 22 Conn. 1; *Naugatuck Railroad Co. v. Waterbury Button Co.*, 24 Id. 468; *Farmers' and Mech. Bank v. Champlain T. Co.*, 18 Vt. 140; *Straiton v. N. Y. & New Haven Railroad Co.*, 2 E. D. Smith 184; *Norway P. Co. v. B. & M. Railroad Co.*, 1 Gray 263; *Nutting v. Conn. Riv. Railroad Co.*, Id. 502; 2 Redf. on Railways, 3d ed., 227, 228; *Ackley v. Kellogg*, 8 Cow. 223; *Van Santroon v. St. John*, 6 Hill 158.

*Jewett*, for the plaintiff.



APPLETON, C. J.—This was an action on the case against the defendants for negligence.

It appeared in evidence from the plaintiff, that she, on the 10th August, 1866, purchased at Lawrence, Mass., a through ticket from that place to Belfast, in this state, for which she paid \$4; that the ticket so purchased was on one piece of paper, but creased for three different tickets; that one part of the ticket was taken by the conductor on the Boston & Maine Railroad, soon after she entered the cars at Lawrence; that a second part was taken at South Berwick by the conductor of the defendant corporation, and the third part on board the steamer, between Portland and Belfast; that she arrived about 11 o'clock at night at the defendants' depot at Portland, where the cars stopped; that she left the cars there to walk to the steamboat Regulator, which lay at the end of a wharf contiguous; that the way to the steamboat was dark; that she proceeded in company with other passengers from the depot to the place of embarkation, without accident, until within, as she judged, from ten to fifteen feet of the edge of the wharf, when, as she was walking along a level surface, without warning of any danger, she stepped her foot into a hole or opening in the planking of the wharf, over which she was passing, and fell backward and fainted; that it was found, on examination, that the small bone of her right leg had been fractured and her right ankle sprained and lamed, and that her back and side were wrenched and lamed; that it was a considerable distance from where the passengers left the cars to the place where they go on board the boat; that she heard no directions nor instructions by any officer of the railroad or steamboat about getting from the cars to the boat, nor saw any one to guide her, and that no one accompanied her with a light; and that she had been over this route twice before.

It was admitted that an arrangement for the sale of through tickets and division of the price, existed between the steamboat and railroad companies over which the plaintiff passed, and that the baggage of passengers was checked through; and that the wharf from which the steamboat sailed and on which the plaintiff was when injured, was the property of the defendant corporation.

It was in evidence that the distance from the place where the cars stopped in the depot, at Portland, to the steamboat, was

about forty rods, and that the defendants had a side track running from their main track, near the depot, to within six or eight feet of the steamboat; that, until within four or five years, passenger cars had been run down this side track to the steamboat; but that, since that time, the use of the side track for passenger cars had been discontinued; and that it was still and had constantly been used for running freight and baggage cars to the steamboat.

The defendants introduced evidence tending to show that, at the entrance to the steamboat wharf was a guide-board, or sign, indicating the way to the steamboat.

There was evidence introduced tending to show that the wharf was in good condition, and that it was amply lighted, and evidence to the contrary.

1. The through tickets in the form of coupons, purchased at Lawrence, entitled the plaintiff to pass over the defendants' road. They are to be regarded as distinct tickets for each road, sold by the first company as agents for the other companies. The rights and liabilities of the parties are the same as if the purchase had been made of the defendants at their station: *Schopman v. Boston & Worcester Railroad Co.*, 9 Cush. 24; *Sprague v. Smith*, 29 Vermont 421; *Hood v. N. Y. & N. H. Railroad Co.*, 22 Conn. 1; 2 Redfield on Railroads, § 185. But railroads may so issue their tickets and so conduct themselves as to have the purchasers understand that they undertake for the whole route, in which case they will be held responsible to that extent: *Quimby v. Vanderbilt*, 17 N. Y., A. 306; *Blake v. G. W. Railroad Co.*, 7 Hurlst. & N. 987.

2. The degree of care and caution required of the carriers of passengers was correctly stated by the presiding justice and in accordance with the authorities. The care to be used depends somewhat upon the value and importance of what is to be carried. The greater the value to be transported, the greater the need of care and caution on the part of the carrier. If the business is of the highest moment, then the skill, care, and diligence should be in proportion thereto. In *Ford v. London & S. W. Railway Co.*, 2 F. & F. 732, Mr. Chief Justice ERLE uses the following language:—"The action is grounded on negligence. The railway company is bound to take reasonable care, to use the best precautions in known practical use for securing the safety and

convenience of passengers." In *Philadelphia & Reading Railroad Co. v. Derby*, 14 Howard 486, Mr. Justice GRIER remarks as follows:—"When carriers undertake to convey passengers by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence." The question came before this court in *Edwards v. Lord*, 49 Maine 279, and the instructions given in this case will be found in accordance with the views of the court as there expressed.

3. The depot and the grounds around the depot belonging to the defendant corporation, and used in connection therewith, should be in safe condition for those who, in the course of travel, are obliged to pass over them. The defendants own the wharf. It is in their use for the purpose of their business as carriers. The cars containing the baggage for the steamboat, with which the defendant corporation is connected, pass over it. The cars, with passengers for the steamboat, formerly passed over it, though they are now discontinued. The wharf is used by the railroad and in connection with the boat. The passengers for the boat pass over it on their way to the boat. It is the way provided. It is the way passengers in the cars are directed to take. The train arrives in the evening. Passengers from the cars to the boat pass rapidly over the intervening distance. The wharf should be lighted. The servants of the defendant corporation should be in readiness to point out the way. The wharf should be safe. The defendants should be justly held responsible for any neglect of their servants, or for any deficiencies in the wharf, which, with due care, might be avoided. If the defendants had carried the plaintiff over the wharf, as heretofore, in their cars, and she had been injured in consequence of the neglect of the defendants, she would have been entitled to recover. Her rights are none the less because she walks over the wharf to reach the steamboat, than if she had been borne over it, if, on the way, she is injured through the negligence of the defendants by leaving the wharf in an unsafe and dangerous condition. The defendants are not released from liability because, for their convenience, she used her own limbs, when she might be entitled to the use of their cars. Their liability did not cease the moment the cars reached the depot. It continued, equally as if at the depot, while

she was on her way over the defendants' wharf, and, by their direction, to the steamboat, and until, in the ordinary course of her passage, she should reach the point where the liability of the steamboat company commences. The passage contracted for was from Lawrence to Belfast. The plaintiff was *in itinere* from the point of departure to the destined point of arrival. The defendants must, at any rate, be deemed liable from the place where they received the passenger to the place where she was to be transferred to the next agent in the course of transmission to the place of her destination.

These views seem to be in accordance with the general principles of law established in similar cases. The proprietors of a railroad, as passenger carriers, are bound to the most exact care and diligence, not only in the management of their trains and cars, but also in the structure and care of their track, and in all subsidiary arrangements necessary to the safety of passengers: *McElroy v. The Nashua & Lowell Railroad Company*, 4 Cush. 400. Assuredly, a safe passage-way to and from the cars is a subsidiary arrangement which passengers have a right to require to be safe. The wharf was this passage-way for those going to the boat from the cars or coming to the cars from the boat. A railway company, for the more convenient access of passengers between the two platforms of a station, erected across the line a wooden bridge, which the jury found to be dangerous; held, that the company were liable for the death of the passenger, through the faulty construction of this bridge, although there was a safer one about one hundred yards further round, which the deceased might have used: *Longmore v. G. W. Railway Co.*, 115 E. C. L. R. 183. In *Nicholson v. L. & Y. Railway Co.*, 3 Hurlst. & Colt. 534, the plaintiff sued the defendants, common carriers, for not sufficiently lighting their depot, and for not providing proper and sufficient accommodation for their passengers to depart safely from their station after their arrival, and for leaving hampers in the way of passengers departing, over which the plaintiff falling was injured. The facts were these. The plaintiff, a passenger by the defendants' railway, was set down at T., after dark, on the side of the line opposite to the station and the place of egress. The train was detained more than ten minutes at T. and, from its length, blocked up the ordi-

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nary crossing to the station, which is on the level. The ticket collector stood near the crossing with a light, telling passengers to "pass on." The plaintiff passed down the train, to pass behind it, and, from the want of light, stumbled over some hampers put out of the train, and was injured. The practice of passengers had been to cross behind the train, when long, without interference from the railway company:—Held, that these facts disclosed evidence for the jury of negligence on the part of the company. In *Martin v. The Great N. Railway Co.*, 30 E. L. & Eq. 473, the defendants, sued as common carriers, were held liable for so negligently managing and lighting their station, that the plaintiff, being a passenger by the railway, was thrown down, while on his way to the carriages. In *Murch v. Concord Railroad Corporation*, 29 N. H. 9, it was held that the owners of railroads, which are public highways, are bound to make such landings and places of access to their roads, as are necessary for the public accommodation, and to keep them in a suitable and safe state for the accommodation of persons who may reasonably be expected to use them. In *Penn. Railroad Co. v. Henderson*, 51 Penn. (1 Smith) 315, the railroad corporation was held liable, as common carriers, for an injury occasioned by not having a safe and convenient platform, the court terming the want of such platform "an imperfection or defect in the road." So the ferryman is bound to have his landing in a complete state of repair for the reception of travellers, and to furnish proper easements for entering the boat, and to provide fastenings to keep the boat in a firm and steady position while passengers are being received: *Cohen v. Hume*, 1 McCord (S. C.) 439.

Indeed, natural persons, who assume no public duties, are held liable if they suffer their property to remain in a condition dangerous to the public: *Elliot v. Pray*, 10 Allen 378. In *Corby v. Hill*, 93 E. C. L. R. 556, the defendant was held liable in tort for negligently placing and leaving an obstruction in the private avenue, known to be used in the ordinary way, whereby a passer lawfully using it, though having no permanent right of way, was injured. In *Packard v. Smith*, 100 E. C. L. R. 468, the refreshment-rooms and a coal-cellar at a railway station were let by the company to one S., the opening for putting in coals being on the arrival platform. A train coming in while the servants of a coal

merchant were shooting coals into the cellar for S., the plaintiff, a passenger, whilst passing in the usual way out of the station, without fault of his own, fell into the cellar opening which the coal merchant's servants had left insufficiently guarded. Held, that S., the occupier of the refreshment rooms and cellar, was responsible for this negligence. Much more is it the duty of railway companies to the public using their railway, to keep the approaches thereto safe and free from obstruction at all points where freight or passengers are received: 1 *Redfield on Railroads* 144. So a railway company is bound to fence the station that the public may not be misled, by seeing a place unfenced, into injuring themselves by passing that way, being the shortest to the station: *Burgess v. The Great N. W. Railway Co.*, 95 E. C. L. R. 923.

4. The damages assessed by the jury are large. Different individuals would vary in their estimate of what would be a just pecuniary compensation for bodily pain and suffering. "It is one thing," observes Mr. Justice STORY, in *Thurston v. Martin*, 1 Mason 197, "for a court to administer its own measure of damages in a case properly before it, and quite another thing to set aside the verdict of the jury because it exceeds that measure." The damages given are not so excessive as to require or justify our interference.

5. Under instructions of the presiding justice, deemed unexceptionable, the jury have found the defendants guilty of negligence. The question was one properly for their determination. The law makes them judges of fact. It is not enough for the court to be satisfied that they should have come to a different conclusion to authorize it to be set aside. As was remarked by ERLE, C. J., in *Longmore v. G. W. Railway Co.*, 115 E. C. L. R. 183, in reference to the safety of a bridge: "I think the judge clearly would not have been justified in taking upon himself as matter of law to determine as to the propriety of its construction, and withdraw that question from the jury." So, too, in the same case, KEATING, J., says: "No doubt the jury might, if so minded, have found that there was no negligence on the part of the company. And it certainly seemed to me there was a strong case for the company." Yet the verdict was sustained. There is no such proof of misconduct that imperatively demands the verdict

to be set aside. The law has made the jury the judges to determine whether the defendants have been negligent or not, and to their determination the defendants must submit.

Exceptions and motion overruled.

KENT, WALTON, BARROWS, and DANFORTH, JJ., concurred.

There are several points brought out in the foregoing opinion which seem to us of considerable practical importance; and which, although largely discussed in many other cases, have not always been so definitely passed upon.

1. The precise point here decided in regard to coupon-tickets for different roads and sold at the office of one, where the passenger goes upon the line, is, that the rights of the passenger and the duty of the several companies are precisely the same as if the tickets had been purchased at the office of each road. This is perfectly definite and intelligible and at the same time just and reasonable. It seems to us impossible for any party interested in such transactions, to raise any fair and just objection to the rule as here declared, so far as the passenger transportation is concerned. The companies could certainly expect nothing less. And it is difficult to present any theory of duty or demand on the part of the companies or the passenger, which will give the passenger any further security or indemnity consistent with established legal principles.

2. The responsibility of passenger

carriers is expressed in rather more moderate terms than we have of late felt was consistent with the advancing exigencies of the business. As the number of passengers and the peril of transportation has been largely increased since the introduction of railways, it seems but just and reasonable to demand of the companies every precaution to insure safety, which is known and in use in the business, whether the expense would be consistent with profit or not. And if companies undertake to carry passengers without these precautions, all hazard should fall upon them, unless the passenger is himself in fault, or the injury occurred wholly without fault or defect of appliances on the part of the company.

3. The rule that the responsibility of one company continues until the safe delivery of its passengers to the custody and responsibility of the next carrier on the advancing line is clearly just and reasonable, and it has also the merit of clearness and definiteness, and is in strict analogy to the duty of common carriers of goods. I. F. R.

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*Supreme Court of Indiana.*

THE STATE EX REL. McCARTY ET AL. v. PEPPER ET AL.<sup>1</sup>

Whenever an act is done or a statement made by a party which cannot be contradicted or contravened without fraud on his part and injury to others whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what would otherwise be mere evidence; the estoppel being limited within such bounds as are sufficient to put those who have dealt on the faith of appearances that turn out to be incorrect, in the same position with reference to the author of such appearances as if they were true.

When a bond has been signed and delivered to the principal obligor by a surety, upon the condition that others not named in the instrument shall sign before it is delivered to the obligee, and it is delivered without such signatures being obtained, and received by the obligee without notice of such condition or circumstances which should put him upon inquiry, the condition imposed will not avail the surety. This is not a question of the power of the principal to deliver the bond in its apparently perfect condition, but simply a question of estoppel.

The principal obligor in a sheriff's official bond is not the agent of the board of county commissioners (whose duty it is to approve the bond) in procuring its execution.

A surety signing and delivering to the principal obligor for delivery to the obligee a bond, before the names of the sureties have been inserted in the body of the instrument, will be held as agreeing that the blank for such names may be filled after he has executed it.

A surety signed a sheriff's official bond after the signatures of other sureties, without reading it, or hearing it read, or asking what it was, on being told by the principal that it was a county paper and requested by him to sign it.

*Held*, that such surety was not released by the fact that one of the signatures before his was forged.

THIS was an action upon the official bond of Michael Batzner, treasurer of Franklin county, for a failure to pay over money collected for the state as such treasurer.

There was an answer setting up the following points of defence:—

First. Putting in issue the execution and delivery of the bond.

Second. The fact of the supposed bond being intrusted to a special agent for the special purpose only of delivering this supposed bond, when certain conditions should be complied with, and that he fraudulently handed the supposed bond over to the obligee without authority.

Third. That after the supposed bond had been delivered to the

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<sup>1</sup> We are indebted for this case to the courtesy of J. B. Black, Esq., State Reporter.—ED. A. L. R.



obligee, there were material alterations made in it without the knowledge or consent of the obligors, which avoided the bond.

Fourth. Upon the plea of those who signed after the bond was delivered to the obligee, that they were induced to sign and deliver it by fraud; and that they would not have signed or delivered it if they had known that it had before been delivered; and that their signing made a material alteration in it unknown to them after delivery.

Fifth. That when the bond was delivered by the obligors they all, except Batzner and Grinkemeyer, supposed that the signatures of all the obligors who purported to have signed it were genuine, and if they had known that any of the signatures were forged, they would not have delivered the bond; whereas, in fact, one of the signatures, that of Grinkemeyer, was not genuine, but a forgery.

The cause was submitted to the court for trial, and there was a finding for the defendants.

The evidence was as follows:—

*Grinkemeyer* testified, that he did not sign the bond or authorize any one to do it for him. (Judgment had been rendered in his favor upon the ground that his signature was a forgery.)

*Clark*.—Batzner wanted me to sign the bond. I told him he knew that I was embarrassed and could do him no good. He said he wanted to get one hundred names on the bond, and my name might induce others to sign it. I was at the time insolvent.

*Pepper*.—Batzner asked me to sign his bond, and said I must or will have one hundred names on it; cannot say which. I put my name there because he said he must or would have one hundred names on it.

*Ottel*.—Batzner asked me to sign my name. I told him it was of no use, that I had no property. He said that made no difference, that it was just for fun. He said that so the paper was full it was right. I did not read it, nor did he read it to me. I thought I was just signing for the character of the man. I cannot read English. He did not tell me what it was for; I supposed it was for the character of the man. I had no property at the time.

*Witt*.—Have lived in this county twenty-three years. Knew Batzner. I signed the bond at my house. Batzner brought a paper to me; I didn't ask what it was, but signed it; didn't

read it; Batzner said, here, Witt, is a county paper, sign it. I didn't ask him what it was, but signed it; he didn't read it to me.

*Martin.*—Batzner asked me to sign the paper. I asked him what it was for. He told me it was for his treasurer's bond. I hesitated, and he then told me I need have no fears, for he would have one hundred good men on it before he attempted to file it.

*Moorman.*—Was sheriff, &c.; saw the bond the day the commissioners met. They met in the auditor's office. There was no court in session. There was a blank in the body of the bond—no names except Batzner's, nor any date to it. The blank was filled up after it was approved by Archy Herndon, by the insertion of the names of the sureties.

*Buckingham.*—Batzner asked me if Mr. D. D. Jones had seen me about his surety bond. I told him he had. I asked him if Mr. Jones and Dr. George Berry had signed it. He said they had not, but were going to; that he had been to see Dr. Berry, and he had promised to come and sign the bond; that he intended to get one hundred names, the best men in the county. I then signed the bond. I asked if Dr. Berry and Dan Jones were certain to go on the bond. He said they were. I was induced to sign the bond by these statements, and knowing that Jones and Berry were leading men in the county, and were well acquainted. My understanding was that Batzner was to get the names before the commissioners met, and the bond was then to go to the commissioners.

*Berry.*—Batzner asked me to sign the bond. I asked him if he had redeemed his pledge he had made as to the number of the men to be on the bond, which was, that he should have one hundred good men on the bond. He said he had not, but would get them. I told him to get ninety-nine and I would be the one hundredth. I did not then sign the bond. The day I signed it he came to me and pressed my signing it. I asked him if he had got the names; and he said he had not, but intended to get them. I told him that was his pledge, and I did not want to go on until he had got them. He said he wanted to get some names in the country, and did not want to go to get them until he had got the names of his acquaintances in town. I told him I would sign with the understanding that I was to be on if there were one hundred good names on the bond. I signed it, and left it with him, with that

understanding. I left it with him. to be delivered when he got one hundred good men on it.

*Shafer.*—Batzner came back with a paper in his hand and asked me if I did not want to sign it? I asked him for what? He said he wanted one hundred men on it for recommendation. He said, You must not be afraid to sign your name. I said if it was nothing else but a recommendation I would do it. I did not read it; it was folded up. I saw nothing written or printed on it. He did not read it to me. I can't read English. I did not ask him to read it to me. I did not know it was a bond. Saw no names on it. Would not have signed it had I known it was a bond. He did not speak of any other paper, or names to a paper, until after I had signed it. During that evening he told me he had a bond filled out at Brookville with sixty names on it.

*Stoops.*—I was one of the commissioners at the time this bond was approved, and was in attendance. It was a special meeting, called to approve the bonds. When it was first presented I objected that there were not names enough on it. Batzner took it out and got King, West, and others to sign it. Don't recollect whether Grinkemeyer's name was on when he brought it back, or not. Can't say whether it had been filled up with names and dates at the time he brought it back, or not.

*Hyatt.*—I was commissioner when this bond was approved, and was present when first presented. It was rejected, only a portion of these names being on it. The balance of the signatures were procured same day and within a short time. Think that after it was objected to, all the names, from Johnson down, were put on it. Grinkemeyer's name was brought in; it had not been on before. Don't know whether it was filled up before approval, or not. When first presented the bond was objected to. Batzner took it out and got on it the name of Johnson and those names below his.

Other parties who had signed the bond testified to the same effect.

The opinion of the court was delivered by

RAY, J.—The question presented in this court is upon the sufficiency of the evidence to sustain the finding.

In the case of *Deardorff v. Foresman*, 24 Ind. 481, 5 Am. Law Reg. N. S. 539, the question presented in this case upon the lia-

bility of the sureties, where the bond has been delivered by them to the principal upon condition that others not named in the bond should sign before the bond was delivered to the obligee, and such delivery was made without such signatures being obtained and received by the obligee in good faith, was examined; and it was held that where "the surety places the instrument, perfect upon its face, in the hands of the proper person to pass it to the obligee, the law justly holds that the apparent authority with which the surety has clothed him shall be regarded as the real authority, and as the condition imposed upon the delivery was unknown to the obligee, therefore the benefit of such condition shall not avail the surety."

This decision was approved in *Webb v. Baire*, 27 Ind. 368; and in *Blackwell v. The State*, 26 Id. 204, where it was held that the principal obligor was not the agent of the board of commissioners. This entirely disposes of the plea of a special agency. The special agent is clothed with the apparent authority to make an unconditional delivery of the bond, and the obligee, uninformed of the condition imposed, is authorized to receive the bond thus delivered. Nothing short of absolute notice to the obligee, or circumstances which should put him upon inquiry, and therefore imply notice, can avoid this rule. It is not, as stated in *The People v. Bostwick*, 32 N. Y. 445, a question of the power of the principal to deliver the bond in its apparently perfect condition, but simply a question of estoppel. The surety signs an instrument complete on its face, and delivers it to the principal to pass over to the obligee; if he impose any condition upon his delivery he must rely upon the principal to execute that condition, for he has made him his agent for the general purpose of a delivery, and has clothed him with the indicia of such agency. The obligee accepts an instrument, perfect in form and execution, which comes to him from the person who should have possession of the instrument for the purpose of such delivery. The entire transaction, so far as the obligee is involved, is according to the ordinary and natural course. The surety, however, while he executes the instrument and places it in the usual channel for delivery, departs from the ordinary course of proceeding by circumscribing the general authority by a condition unknown to the obligee. The condition is disregarded; a fraud is accomplished; and he who has not scrupled to trust his principal with the semblance of a general

authority to make the delivery must stand the hazard he has incurred.

A much broader scope has been given to the doctrine of estoppels *in pais*, both in this country and in England, than formerly obtained; and it is now established that whenever an act is done or a statement made by a party, which cannot be contradicted or contravened without fraud on his part and injury to others whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what would otherwise be mere evidence. The estoppel must obviously be limited within such bounds as are sufficient to put the party who has dealt on the faith of appearances that turn out to be incorrect, in the same position with reference to the author of such appearances as if they were true. "The truth is, courts have been for some time favorable to the utility of the doctrine of estoppels, hostile to its technicality:" 2 Smith Lead. Cas. 460; *Smith v. Newton*, 38 Ill. 230; *Knoebel v. Kircher*, 33 Ill. 308.

It is intimated by Judge REDFIELD in a note to the case of *The York Co. M. F. Insurance Co. v. Brooks*, 3 Law Reg. (N. S.) 403, that the English courts have denied the application of the rule to this class of cases, that he who by his culpably negligent act enables his agent to commit a fraud to the prejudice of third persons, is estopped from denying the actual authority of the agent, and the cases of *Swan v. The North British, &c., Co.*, 10 Jur. N. S. 102, and *Patchin v. Dubbins*, 23 Eng. L. & Eq. R. 609, are cited as authority for the remark.

In the case *Deardorff v. Foresman*, *supra*, we examined the first case cited, and the result proved that his conclusions were not sustained by that authority. The case cited of *Patchin v. Dubbins*, was where a vendor of land covenanted that no building except tombs should be erected on any part of his land opposite to the land sold. Subsequently the vendor sold part of the land on the other side of the road, and the purchaser built thereon. No objection was made to the building erected, as it did not intercept the view of the first vendee. Subsequently another part of the land was sold and buildings about to be erected when the original purchaser filed a bill to enjoin the building; but the court dismissed the bill, holding that the true meaning of the covenant was that it extended only to so much of the lands of the original vendor as were exactly opposite to the land sold to the plaintiff.

If this decision is a denial of the application made in this country of the rule referred to, the English Court of Appeal in Chancery has evinced so much delicate consideration for the American courts that its line of departure from their rulings cannot be traced.

But since the decision of this court in the *Deardorff* case, the question there considered has been before the Supreme Court of the state of Maine, and has received a like solution: *State v. Peck*, 53 Maine 284. This decision, published in the year following the case in this court, reviewing as it does the same line of authority, supporting itself by the same decisions and arguments which approved themselves to us, renders it unnecessary that we should do more than quote the result reached. "A bond, perfect upon its face, apparently duly executed by all whose names appear therein, purporting to be signed, sealed, and delivered by the several obligors, and actually delivered by the principal, without stipulation, reservation, or condition, cannot be avoided by the sureties upon the ground that they signed it on the condition that it should not be delivered unless it should be executed by other persons, who did not execute it, when it appears that the obligee had no notice of such condition, and nothing to put him upon inquiry as to the manner of its execution, and also that he has been induced, upon the faith of such bond, to act to his own prejudice."

Before passing from this portion of the case it may be well to add a remark to our comments made in the *Deardorff* case upon the decision in the Supreme Court of the United States in *Pawling v. The United States*, 4 Cranch 219. The action was upon an appeal bond given by Ballinger and signed by Pawling, Todd, Adair and Kennedy as his sureties, who pleaded that they delivered the same as an *escrow* to one Joseph Ballinger, to be safely kept upon condition that if Simon Ingleman and William Patton, named on the face of the bond, should execute the same as co-sureties, then the bond should be delivered to the agent of the United States, otherwise not. There was an issue upon this averment of a delivery as an *escrow*, and the question was presented to the court upon a demurrer to the evidence introduced by the defendants. Without commenting upon the allegation that an instrument not fully executed was delivered as an *escrow*, we cite a paragraph from the opinion of Chief Justice MARSHALL: "It

is also of some importance that the defendant Todd had previously declared that he would not be apprehensive of becoming a security for Ballinger, provided others whom he named should also become securities, *and that he inserted the names of the others in the bond in the presence of the witness.*"

When it is considered that this is the original decision upon which all the cases rest, which assume to release the surety from liability when the name of his co-surety *does not appear on the face of the instrument*, the entire want of authority to justify their departure from sound principle can be appreciated.

The evidence in the case in judgment did not authorize the finding that the sureties were released because others did not sign the bond as co-sureties.

There remain but two questions. Of these there can be nothing predicated on the fact that the bond was not accepted upon its first presentation to the board of commissioners. No formal action was taken by the board at that time, but it remained in session to act upon the bond when presented, and the names of the sureties were left blank in the body of the instrument for the very purpose of procuring names sufficient to satisfy the board. A party signing and delivering an instrument in this condition must be held as agreeing that the blanks may be thus filled after he has executed it, and the evidence introduced shows full authority given to the principal to procure such signatures as he secured: *Inhabitants of South Berwick v. Huntress*, 53 Maine 89; *Smith v. Crooker*, 5 Mass. 538; *Hudson v. Revett*, 5 Bing. 368; *Eagleton v. Gutteridge*, 11 M. & W. 466.

The rule as stated in 1 vol. Leading Cases in Equity 157, in the note to *Dearing v. Earl of Winchelsea*, is, "that where a note with the names of certain persons upon it, who stood in the relation of co-sureties for the maker, has been offered for discount, and not being satisfactory, the name of another person has been procured, who also became a surety for the maker, all these persons are co-sureties with one another, and subject to mutual contribution, *though the earliest sureties had no knowledge of the last becoming a surety.*" The cases fully sustain this doctrine: *Stout v. Vauze*, 1 Robinson (Va.) 169; *Warner v. Price*, 3 Wend. 397; *Norton v. Coons*, 3 Denio 130; s. c., 2 Selden 33; *Woodworth v. Bowers*, 5 Ind. 277; *Sesson v. Barrett*, 6 Barb. 199; s. c., 2 Com. 406; *McNeil v. Sandford*, 3 B. Monroe 11.

The cases of *O'Neale v. Long*, 4 Cranch 60, and of *Harper v. The State*, 7 Blkf. 61, if to be sustained, must rest on the fact that a perfect instrument had been delivered by the original sureties, fully executed and filled up, and that the names of other sureties were afterwards inserted in the body of the instrument without the consent of such original sureties. Here the space was left blank for the very purpose of inserting the names of all who might sign the bond.

The name of Grinkemeyer, however, was forged to the bond; but this was the last name signed except that of Witt, and as the signatures preceding Grinkemeyer were in no way procured by the forgery, they cannot be released thereby. The supreme confidence evinced by Witt in "county papers" will relieve him from any suspicion of having been influenced to sign by any preceding names. Indeed, there are cases which would hold him as affirming the genuineness of the preceding signatures: *York Co. M. F. Ins. Co. v. Brooks*, *supra*; *Terry v. Hazlewood*, 1 Duvall (Ky.) 104.

The former decision in this case in 22 Ind. 399, is overruled for the reasons given in *Deardorff v. Foresman*, *Blackwell v. The State*, *Webb v. Baird*, *supra*, and by the decision herein. It should have been regarded by our courts as overruled by the first two cases cited.

The judgment is reversed, with costs, and the cause remanded for a new trial.

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*United States Circuit Court, District of Connecticut.*

SEMMES, ADMINISTRATOR OF LUCKETT, v. CITY FIRE INSURANCE COMPANY.

The late rebellion was such a war as suspended the right of a citizen of Mississippi to sue on a policy of insurance in a Connecticut company.

In addition to this consequence of a state of war, the right to sue on such a policy was suspended by the Proclamation of the President, of August 16th 1861.

Where a policy contained an express provision that in any action under it commenced more than a year from the time of loss, the lapse of time should be *conclusive evidence* against the validity of the claim, the period of the war must be omitted in computing the year.

The condition of war existed as regards the state of Mississippi, at least from 16th August 1861, when the President, in pursuance of the Act of Congress of July



13th 1861, declared that state in insurrection. Whether the war commenced, in contemplation of law, before that date, not decided.

The legal period of the termination of the war depends not on the continuance or cessation of active hostilities, but on the acts of the departments of the government to which political powers are intrusted. The Proclamation of the President of June 13th 1865, removing the restrictions on trade as to the states theretofore in insurrection, was a valid act of recognition by the executive department of the government of the termination of the war, and the right of plaintiff in this action, to sue, revived from that date.

THIS was a suit on a policy of insurance against fire issued to William R. Luckett, of Mississippi, dated August 3d 1860, upon a building situated at the Artesian Springs, Madison county, in that state. It was conceded that a total loss occurred on the 5th of January 1861, and during the life of the policy,—that the assured subsequently died,—and that the defendants are liable to his administrator in this suit, unless the right to recover is barred by lapse of time.

Suit was commenced October 31st 1866, and defendants pleaded the following condition of the policy: "It is furthermore expressly provided, that no suit or action of any kind against said company, for the recovery of any claim upon, or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed conclusive evidence against the validity of the claim thereby so attempted to be enforced."

Plaintiff replied (among other matters not important in the view taken by the court), that the assured, down to the time of his death, was a resident and citizen of the state of Mississippi, and that the plaintiff, during his whole life, has been and still is a resident and citizen of the same state. That from April 15th 1861, to April 2d 1866, a state of war between the so-called Confederate States, including the state of Mississippi, and the United States, existed, whereby all right of the assured during his life, and of his administrator since his death, to maintain any action against the defendants, was by law suspended, during all that time.

This replication the defendants have traversed.

By stipulation the case was tried by the court instead of the jury.

*William Hamersley & H. K. W. Welch*, for plaintiff.

*C. R. Chapman and A. P. Hyde*, for defendants.

SHIPMAN, J.—[After stating the facts and disposing of some preliminary questions.]—The replication sets up the late rebellion, and alleges that a state of war existed between the organization known as the Confederate States, including the state of Mississippi, and the United States, from the 15th of April 1861, to the 2d of April 1866, whereby it is claimed that this contract and all right to sue upon it was, during all that time, suspended. There is no allegation that the courts of Mississippi, or the national courts in that state, were closed for any specific length of time, nor that the plaintiff, or his intestate, labored under any personal disability arising out of his actual participation in the war, nor that he was under the control of any *vis major*, beyond what the law implies from the state of war. The whole question, therefore, turns on the legal consequences of the war in their operation on this contract, and the length of time these consequences continued.

It is, of course, conceded that a state of war, recognised as such by and between the belligerent parties, suspends all contracts in existence between the citizens of the respective belligerents at the time the war commences. The authorities are uniform on this subject. The general rule is well stated by Mr. Justice NELSON in the *Prize Cases*, 2 Black 687. "The legal consequences resulting from a state of war between two countries at this day, are well understood, and will be found described in every approved work on the subject of international law. The people of the two countries become immediately the enemies of each other,—all intercourse, commercial or otherwise, between them unlawful,—all contracts existing at the commencement of the war suspended, and all made during its existence utterly void." This doctrine has been repeatedly recognised and applied to our late civil war by the courts of this country, both state and national: *Hanger v. Abbott*, 5 Wall. 532; *Tucker v. Watson*, 15 Am. Law Reg. 22; *Jackson Ins. Co. v. Stewart*, Id. 732; *Conn. Mut. Life Ins. Co. v. Hall*, 16 Id. 606.

It is equally well settled that, upon the termination of the war, obligations contracted before its commencement, between the respective subjects, though the remedy for their recovery is suspended during the war, are revived: Lawrence's *Wheaton*, p. 877, and the cases above cited. In *Hanger v. Abbott*, and *Jackson Ins. Co. v. Stewart*, this doctrine was applied to the Statutes of Limitation. In the former case, Mr. Justice CLIFFORD, speaking for the court, says: "When a debt has not been confiscated, the rule undoubtedly is that the right to sue revives on the restoration of peace, and Mr. Chitty says that with the return of peace we return to the creditor the right and the remedy. Unless we return the remedy with the right, the pretence of restoring the latter is a mockery, as the power to exercise it with effect is gone by lapse of time during which both the right and the remedy were suspended."

Applying these doctrines to the present case, it follows that the war, in which the people of Mississippi on one side, and those of Connecticut on the other, participated, suspended this contract with all its incidents, including the condition set up in bar of this action, and all rights of action under it. In view of the result to which I have come, it is unnecessary to determine the precise date of the beginning of the war, when this suspension commenced. It is immaterial whether we take the 15th of April, as stated in the replication, the date of the President's proclamation calling for volunteers; or the 19th of April, when by proclamation he declared that an insurrection had broken out in certain states, including Mississippi, and declared his purpose to blockade their ports; or the 16th of August 1861, when in pursuance of the Act of Congress of July 13th 1861, he, by proclamation, formally declared the inhabitants of those states in insurrection, and announced the prohibition of all commercial intercourse between them and the inhabitants of the other parts of the United States. It is conceded on all hands that at least from August 16th 1861, this contract was suspended, both by the inevitable legal effect of the state of war, and by the interdiction of intercourse announced by the proclamation of that date. The rules of public law, as well as the Act of Congress referred to, lead to this result. Therefore, as the twelve months within which a suit could be legally brought on this policy had not expired when the war commenced, and thus imposed a disability on the assured, it becomes

essential to determine whether this disability has been removed, and if so, when that removal took place. It is conceded in this case that the disability has been removed, and the right to sue revived. The plaintiff not only admits, but must maintain, that this took place before October 31st 1866, when he brought this suit. Otherwise he could have no standing in court. As the contract and all remedies under it were absolutely suspended by the war, no suit could have been brought while that suspension continued. But the plaintiff goes further, and alleges, in effect, in his replication, that the war ended, so far as the state of Mississippi and its inhabitants are concerned, on the 2d of April 1866, the date of the President's proclamation to that effect, and not before. On the other hand, the defendants insist that it ended as early as June 13th 1865, when the President, by proclamation, appointed a provisional governor over the state of Mississippi, and directed the United States district judge for that judicial district to proceed to hold the courts.

Now, it must be remembered, that though this was a war between belligerents, attended while it continued by those legal consequences which public law always attaches to all legitimate warfare, yet it was a civil war in which the revolted party was defeated, and its organization as a *de facto* government under the name of the Confederate States of America, politically annihilated. No treaty of peace in the ordinary sense of that term could be negotiated, as but one of the parties which had waged the war was in existence as a treaty-making power at its close. Therefore no such treaty has drawn the line where the war ended, and suspended contracts revived. We must therefore look to the acts of the only surviving party to ascertain when those disabilities, legally imposed by the state of war, ceased. It is hardly necessary for me to say that the principle here stated lends no support to the doctrine put forth in some quarters, and which that distinguished jurist, Mr. Justice SPRAGUE, characterized as a "grave and dangerous error,"—that the suppression of the rebellion conferred upon the United States the rights of conquest,—the right to treat the states included in the rebellion as foreign territory acquired by arms, and permanently divest them and their inhabitants of all political privileges: Sprague's Decisions, II., p. 147. That notion has nothing to do with the point now under consideration. The United States, in suppressing the rebellion, destroyed the political

organization known as the Confederate States, and not the individual states as political communities. But though the states remained after the contest ended, the belligerent power known as the Confederate States which had represented them in the war, disappeared at its close. Neither of the states which remained had the power, or attempted, to negotiate a treaty of peace with the United States. In determining, therefore, when the rights, suspended by the war, revived, we must look to the action of the only power in existence which could effectually deal with that subject. This power was the government of the United States.

It is a settled rule with the courts of the United States, in ascertaining whether or not war exists, to look to the action of those departments of the government to which that subject is confided by the Constitution. Courts never inquire, when investigating questions of this character, when active hostilities ceased. The termination of war, and the establishment of the relations of peace, are political acts, to be performed exclusively by the departments of the government to which political powers and duties are intrusted. The action of these departments, when within the authority conferred by the Constitution, is conclusive and binding on the courts as well as citizens. When war has existed between the United States and a foreign country, its termination is easily ascertained by a reference to the treaty of peace which follows it, and which is consummated by the President acting by and with the advice and consent of two-thirds of the Senate. As no such treaty did, or could, mark the close of this civil war, we must look to the action of the President, or Congress, or both, and from that action ascertain when the war ended, and when the legal consequences which flowed from it ceased to act in any given case.

I have already shown that by the rules of public law universally recognised among civilized nations, as well as by the decisions of our own courts, the existence of this war suspended all contracts between the citizens of the respective belligerents, entered into before it commenced. It rendered, for the time being, all commercial intercourse between the citizens of two sections unlawful, and converted them into enemies. But in addition to this, Congress passed an act, July 13th 1861, authorizing the President in certain cases, by proclamation, to declare the inhabitants of a state in insurrection against the United States, where

upon all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States should become unlawful. In pursuance of this statute the President, on the 16th of August 1861, issued his proclamation declaring the inhabitants of certain states, including Mississippi, in insurrection against the United States. By force of this proclamation, then, and the statute authorizing it, as well as by the legal effect of the war then existing, all pre-existing contracts between the people of the respective belligerents, including the right to enforce them by judicial proceedings, were thenceforth suspended. In progress of time hostilities ceased, and the executive department of the United States commenced a series of acts recognising a change in the relations of the government towards the inhabitants of the states lately in rebellion. May 22d 1865, the President issued a proclamation raising the blockade of most of the closed ports, and removing "all restrictions upon trade heretofore imposed in the territory of the United States east of the Mississippi river, save those relating to contraband of war, to the reservation of the rights of the United States to property purchased in the territory of an enemy, and to the 25 per cent. upon purchases of cotton." The same proclamation declared that all provisions of the internal revenue law should be carried into effect by the proper officers.

May 29th 1865, the President proclaimed amnesty and pardon to all persons in the late revolted states, except certain specified classes, with restoration of all rights of property, except slaves, and in cases where legal proceedings had been commenced for the confiscation of property of persons engaged in rebellion, on condition that they should take and subscribe a certain oath.

On the same day he issued a proclamation appointing a provisional governor for North Carolina, and prescribing his duty and authority.

June 13th 1865, he issued a similar proclamation relating to Mississippi.

On the same day he issued a proclamation appointing a provisional governor over Tennessee, and declaring, among other things, "that all restrictions upon internal, domestic, and coastwise intercourse and trade, and upon the removal of the products of states heretofore declared in insurrection, reserving and excepting only those relating to contraband of war, as hereinafter recited, and

also those which relate to the reservation of rights of the United States to property purchased in the territory of an enemy, heretofore imposed on the territory of the United States east of the Mississippi river, are annulled, and I do hereby direct that they be forthwith removed." The other provisions of this proclamation it is not necessary to notice here.

April 2d 1866, the President issued a proclamation formally declaring the insurrection that had existed in certain states, including Mississippi, at an end, and to be thenceforth so regarded.

It should be remarked that there was no executive declaration that the insurrection was ended, before that of April 2d 1866, in any state except Tennessee. On the 13th of June 1865, he did, in the proclamation already cited, declare it terminated in the last-named state. In a proclamation of the same date relating to Mississippi, and in the one of May 29th 1865, relating to North Carolina, he spoke of the armed forces of the rebellion as having been "almost entirely overcome."

We must now inquire into the legal character of the proclamations of the President restoring commercial intercourse to and with the states which had been engaged in the rebellion, and the rest of the United States. And, first, as to his authority to issue such proclamations. I think there can be no doubt on that point. The Supreme Court of the United States recognised the power of the President to, in effect, declare the inhabitants of the disaffected states in a state of insurrection as early as April 19th 1861, when he set on foot the blockade of certain ports, including those in Mississippi (*The Prize Cases*, 2 Black 670). In the opinion in these cases, Mr. Justice GRIER, speaking for a majority of the court, says:—"Whether the President, in fulfilling his duties as commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions, as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this court must be governed by the decisions and acts of the political department of the government to which this power was intrusted. He must determine what degree of force the crisis demands. The proclamation of blockade is itself official and conclusive evidence to the court that a state of war existed which demanded and authorized a recourse to such a measure, under the peculiar cir-

cumstances of the case." There had been no declaration of war. Congress can alone declare war, but the court held in the same cases that that body could not declare war against a state, or any number of states, by virtue of any clause in the Constitution. It also held that the President had no power to declare or initiate a war either against a foreign nation, or a domestic state. It, however, distinctly decided that the President could, and did, recognise a state of war as actually existing, and that the courts were bound to accept such recognition of the fact as conclusive. Of course they must recognise the legal consequences which flow from the state of war. It would seem to follow that if the President has the power to recognise the state of war as an existing fact, and this recognition is binding on the courts, he must equally have the power to recognise a state of peace as an existing fact, and the courts are equally bound by such recognition. Especially would this seem to be the case in this civil war, where no formal treaty of peace could mark the line where war ended and peace commenced, and where there was no declaration of the legislature inconsistent with the proclamation of the Executive.

But whether this is the true doctrine or not, it must be remembered that the Act of Congress of July 13th 1861, authorized the President to declare certain states in insurrection, whereupon all commercial intercourse was to become unlawful. On the 16th of August following he issued such a proclamation. From that time forward the interdiction of commercial intercourse had the double sanction of public law and a special Act of Congress operating from the date of the proclamation. Now, it may be said with some force, that inasmuch as commercial intercourse became unlawful under this Act of Congress, *ipso facto*, on the declaration of the President of the fact of insurrection, it must have continued unlawful until the insurrection was by him, or Congress, declared ended; and that, therefore, he could not legalize free intercourse between the citizens of the two sections, without first declaring the rebellion suppressed. But this would be a very narrow and technical view to take of a great public question, relating to an anomalous condition of public affairs, and bearing upon interests of infinite diversity and great magnitude. The Act of July 13th 1861, by its express terms, was to be operative as an interdiction of intercourse, only through a proclamation of the President. Congress left it to his discretion to put



the interdiction in force. I think, by fair implication, it left with him the power to withdraw it. There were reasons of the highest public import why this power should remain with him. The war had commenced during a recess of Congress. It was necessary for the President to act promptly, and he called for troops, and set on foot a blockade some time before Congress could assemble. Hostilities might cease, and the war be substantially terminated, also, during a recess of Congress, when prompt action by the President might be of the highest importance both to our foreign and domestic commerce. This power of the Executive to restore pacific intercourse seems to have been practically conceded without dissent from any quarter. Neither Congress, nor the Executive, nor the people have acted upon the assumption that intercourse between the people of the two sections in private civil affairs has been unlawful since June 13th 1865. On the contrary, by the common consent of all departments of the government, such intercourse was substantially free and unrestrained after that date, as well as after the 2d of April 1866. Business began to seek its old channels; new contracts were made; old ones litigated and enforced in the courts of both sections, and money invested at the South in various enterprises. No doubt would ever have arisen as to the validity of the President's proclamation removing all restrictions upon ordinary pacific intercourse between the people, but for the subsequent struggle between Congress and the executive department as to the political status of the Southern States. But that controversy has no proper relation to the question now under consideration. Congress has never, even by implication, declared commercial and pacific intercourse of any kind unlawful, since the President assumed to remove the restriction, June 13th 1865. On the contrary, its silence on this subject, when legislating on the purely political questions involved in what is called "Reconstruction," supports the inference that the ordinary civil pursuits of the people, and all the rights incident to them, including the right to free intercourse between the citizens of both sections, and the right to resort to legal civil remedies, were considered by Congress itself as no longer under the ban of war. I am, therefore, satisfied that the authority of the President to issue the proclamation of June 13th 1865, restoring free intercourse, was full and ample,

and that its exercise has been acquiesced in by the national legislature.

We are next to consider what was the legal effect of that proclamation. Its language has already been cited. Beyond all question, it embraces all contracts thereafter to be made, and delivers them from the invalidating effect of public law, as well as from the effect of the statute of July 13th 1861, and the proclamation made in pursuance thereof, August 16th following. Such contracts being valid, the right to enforce them in the courts necessarily followed. A citizen of one section could sue a citizen of the other on such a contract without having his suit defeated on the ground that it was invalid either by public or statute law; or abated under the plea of alien enemy. Both the right and the remedy on such a contract were complete.

The question then arises, in what condition were the numerous contracts existing when the war commenced, left by the proclamation of June 13th 1865? Were they still suspended, and the parties without any right to enforce them? Undoubtedly unpaid debts contracted before the war could have been lawfully paid by citizens of one section to those of the other, at any time after the date of this proclamation. This would be exercising one of the privileges of "domestic intercourse," restored in express terms by that proclamation. It would seem to follow that the right to enforce payment through ordinary legal remedies must have been restored also. It would be absurd to contend that the proclamation removed the prohibition to enter into new contracts, and left those entered into before, and existing at, the commencement of the war, suspended. Such a distinction would be unjust as well as absurd. It would be a distinction between rights of the same class, and could rest upon no principle of natural justice, good sense, or sound policy. No such construction should be given to a state paper like this proclamation. It was made in the interests of peace, and its ordinary beneficent pursuits, and in furtherance of the rights of the people of both sections of a common country. No possible advantage in the way of convenience, interest, or security to the public or to individuals, consistent with justice, requires that its operation and legal effect should thus be contracted. It should, therefore, receive a liberal rather than a narrow and technical interpretation.

It follows from these principles, that the contract upon which this suit is founded, though suspended during the war, while intercourse between the citizens of the belligerent sections was unlawful, revived on the 13th of June 1865, and from that date was in full force. From that time there has been no legal obstacle to its enforcement. Whether Mississippi was without civil tribunals during any portion of the time since the contract revived, is neither averred in the replication, nor was it proved on the trial. This court cannot take judicial knowledge of that point. But it is immaterial. The plaintiff could have resorted to the state tribunals of Connecticut, or to this court, at any time since his appointment as administrator. Not having brought his suit within the time limited by the policy, exclusive of the whole period of disability, the plea in bar is a conclusive answer to his right to recover. Judgment must, therefore, be entered for the defendants.

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*Supreme Court of Pennsylvania.*

SCHAFFER v. THE FARMERS' AND MECHANICS' BANK OF  
EASTON.

B. made a note payable to J. S. endorsed it: afterwards J. endorsed it and it was discounted by a bank for J. *Held*, that S. was not liable either to the bank or to J. without evidence *dehors* that he had assumed the liability.

The mere endorsement in such case did not authorize the holder to write a guaranty over it, but a special original agreement might be established by proof.

The payee, who was also an endorser, was incompetent to testify to such a special agreement of the irregular endorser.

The endorsement is not a note in writing, as required by the act of April 26th 1855 (Frauds).

The proof of a collateral liability for the debt of the maker different from that which the endorsement imports cannot be made by parol.

*Taylor v. McCune*, 1 Jones 460, and *Keyner v. Shower*, 1 Harris 446, remarked on.

ERROR to the Court of Common Pleas of *Northampton county*.

This was an action of *assumpsit* by The Farmers' and Mechanics' Bank of Easton as holder, against Solomon Schaffer, as endorser of the following note:—

"\$1300

Nazareth, October 19th 1863.

"Sixty days after date I promise to pay to the order of Jacob and Joseph Schafer, at The Farmers' and Mechanics' Bank of Easton, Thirteen Hundred dollars, without defalcation for value received.

"BENJAMIN SCHAFER."

"Endorsed—SOLOMON SCHAFER,

"JACOB SCHAFER, Jr.,

"JOSEPH SCHAFER."

The first count of the declaration alleged an agreement by the defendant to be accountable for the payment of the note if the plaintiffs would discount it for the payees. The second and third counts charged the defendant as second endorser, alleging that the payees were first endorsers. The declaration had also the common counts.

On the trial before JONES, P. J., the plaintiffs proved the signatures of the drawer and all the endorsers of the note, notice to all the endorsers, and the protest; also that the note was discounted by the plaintiffs on the 4th of November 1863, and the proceeds paid to Jacob Schafer, Jr., and Joseph Schafer. They further offered to prove that the defendant after the maturity of the note admitted his liability on the note and asked time. This offer was objected to, admitted, and a bill of exceptions sealed. Mr. Foreman, cashier of the bank, testified that the defendant wanted time on this note as well as on some others, the bank agreed to give him time; shortly afterwards he came to the bank and said he had been advised not to pay this note.

The plaintiffs then called Jacob Schafer, Jr., one of the payees and endorsers, and offered to prove by him "the giving of the note, the endorsement by S. Schafer, and the circumstances attending it." The offer was objected to, admitted and a bill of exceptions sealed.

The witness testified that the note was given to the payees for cattle sold by them to the drawer, the price of the cattle was to be paid on the delivery, or a note given payable in bank with good security; that the defendant agreed to become the surety, and the note in suit was drawn; was signed by Benjamin Schafer, endorsed by the defendant, and delivered to Joseph and Jacob Schafer, Jr., with the understanding that the money was to be obtained on it from the plaintiffs. It was endorsed by the payees,

and discounted by the plaintiffs. The drawer and payees of the note were all insolvent.

The defendant submitted the following points:—

1. The blank endorsement "Solomon Schafer," on the note in suit, of itself alone, imports no liability of Solomon Schafer in favor either of the payees or of their endorsees the plaintiffs.

2. Upon such endorsement, the holder can in no event recover except upon satisfactory proof of a contract of guaranty or suretyship, by such endorser, and that the note was discounted upon the faith of such contract.

3. If the proof of such a contract of guaranty or suretyship, shows it to rest in parol, it is void under the statute of frauds and no recovery can be had upon it.

The court answered the defendant's points in the negative, and directed the jury to return a verdict for the plaintiffs for the whole amount of their claim.

The defendant took a writ of error, and assigned for error the admission of the evidence in the several bills of exceptions, and the charge of the court.

*O. H. Meyer and H. Green*, for plaintiff in error—*J. Shafer, Jr.*, was incompetent: *Purviance v. Dryden*, 3 S. & R. 402; *Heckert v. Fegely*, 6 W. & S. 142; *Porter v. Wilson*, 1 Harris 641; *Geoghegan v. Reed*, 2 Wh. 152; *Hinckley v. Waters*, 9 Watts 179; *Barnes v. Ball*, 1 Mass. 73; *Talbot v. Clark*, 8 Pick. 51; *Herrick v. Whitney*, 16 Johns. 240; *Shaver v. Ehle*, Id. 201; *Martin v. Henrickson*, 1 Ld. Raym. 1007; *McKennon v. McRae*, 2 Porter 389; *Baskins v. Wilson*, 6 Cowan 471; *Steinmetz v. Currie*, 1 Dallas 269; *Bailey v. Knapp*, 7 Harris 192; *Hatz v. Snyder*, 2 Casey 511; *Loudon Saving Fund v. Hagerstown Bank*, 12 Id. 498; *Purdy v. Dedrich*, 2 Phila. R. 278. The defendant's name on the note created no liability: *Shenk v. Robeson*, 2 Grant 372; *Schollenberger v. Nehf*, 4 Casey 189; *Fegenbush v. Lany*, Id. 193; *Barto v. Schmeck*, Id. 447; *Smith v. Kessler*, 8 Wright 142. The testimony of the witnesses was to charge the defendant by parol for the debt of another: Act of April 26th 1855, § 1, Pamph. L. 308; *Purd. 497*, pl. 4. The defendant by his endorsement did not give authority under the circumstances in this case to make a contract over his name, or if he did it has not been exercised, and it is too late at the trial: *Tillman v.*

*Wheeler*, 17 Johns. 326; *Jack v. Morrison*, 12 Wright 113; *Martin v. Duffy*, 17 Leg. Int. 148; *Farebrother v. Simmons*, 5 B. & A. 353.

The first count alleges that the defendant was surety. The evidence of J. Schaffer, Jr., tends to prove a guaranty of the defendant to the payees, not the bank. The other counts charged the defendant as second endorser, the payees being first endorsers. The proof does not sustain the allegation in any of the counts: 1 Greenl. Ev. § 66, and cases cited in the notes: *Rowan v. Rowan*, 5 Casey 181; *Fegely v. Bellas*, 5 Harris 67. This is the case of an irregular endorsement without any contract of guaranty: *Taylor v. McCune*, 1 Jones 465; *Tillman v. Wheeler*, 17 Johns. 326; *Unangst v. Hibler*, 2 Casey 150; *Petriken v. Baldy*, 7 W. & S. 429. There was no agreement with the bank to give time, which would be necessary to bind the defendant: *Miller v. Stem*, 2 Barr 286. There was no consideration for defendant's promise to pay the note: *Paul v. Stackhouse*, 2 Wright 302.

*W. H. Armstrong* and *H. D. Maxwell*, for defendants in error.—The defendant became liable to a holder by his endorsement: *Herrick v. Carman*, 12 Johns. 159; *Kyner v. Shower*, 1 Harris 444; *Edwards on Bills* 231, 245, 259, 274; *Hall v. Newcomb*, 3 Hill R. 233; *Seabury v. Hungerford*, 2 Id. 80; *Cottrell v. Conklin*, 4 Duer R. 45; *Barto v. Schmeck*, 4 Casey 447; *Lecoon v. Kirkman*, 95 E. C. L. 929; *Weaver v. Marvel*, 12 La. 517; *Story on Promissory Notes*, § 134. J. Schaffer, Jr., was competent: 1 Greenl. Ev. § 899; *Steckel v. Steckel*, 4 Casey 233; *Taylor v. McCune*, 1 Jones 461. The promise need not be made to the plaintiff himself: *Beers v. Robinson*, 9 Barr 229; *Leech v. Hill*, 4 Watts 448; *Campbell v. Knapp*, 3 Harris 30; *Schollenberger v. Nehf*, 4 Casey 191; *Fegenbush v. Lang*, Id. 193; *Herrick v. Carman*, 10 Johns. 224; *Shenk v. Robeson*, 2 Grant 372; *Levy v. Peters*, 9 S. & R. 125; *Sherer v. Easton Bank*, 8 Casey 141. The Statute of Frauds does not interfere, the consideration moved directly from the promisee to the promisor: *Paul v. Stackhouse*, 2 Wright 302. The defendant's endorsement alone is sufficient: *Story on Promissory Notes* 640; *Oakley v. Johnson*, 21 Wend. 588; *Smallwood v. Vernon*, 1 Strange 478; *Ballengall v. Gloster*, 3 East 482; *Russell v. Langstaffe*, Doug. 514; *Josselyn v. Ames*,

3 Mass. R. 273; *White v. Howland*, 9 Id. 315; *Hunt v. Adams*, 5 Id. 358; *Palmer v. Grant*, 4 Conn. R. 389; *Beckwith v. Angel*, 6 Id. 315; and see other cases cited in *Dean v. Hall*, 17 Wend. R. 219, 220; *Seymour v. Van Slyck*, 8 Wend. R. 421, 422; Chitty on Bills 218, 219; *Hill v. Lewis*, 1 Salk. 132.

The opinion of the court was delivered, May 11th 1869, by

SHARSWOOD, J.—In what light one who endorses a promissory note before the payee is to be regarded has long been a much vexed question in the American cases. Their name is legion. More than fifty are cited in a note to Byles on Bills 144, 5th American edition, without pretending by any means to give a catalogue of all. In some he is treated as a joint and several promissor with the maker; again, as a guarantor to the payee, and all others who may lawfully be possessed of the note, each holder having a right to fill in such undertaking over his name; in others as a second endorser, the payee having the right at any time to restrict his own prior endorsement by the words "without recourse;" and in others, still as a second endorser merely under an implied engagement by the payee to assume the position and all the responsibilities of first endorser. In a large majority of them he is treated as an original promissor or a guarantor, according as the evidence may show the original contract of the parties to have been. It will be sufficient to refer simply to the cases in this state. In *Leech v. Hill*, 4 Watts 448, this court declined to say what would be the effect of such an endorsement, unaccompanied by evidence *dehors*, and declared that there was no other rule by which it is to be construed than according to the understanding of the parties. In *Taylor v. McCune*, 1 Jones 460, however, it was decided that in the absence of any such evidence his position was that of second endorser. The opinion of the court, as delivered by Mr. Justice BELL, adopts *Herick v. Carman*, 12 Johns. 159, as a sound exposition of the law; for the reason that otherwise there would be no case where a note is innocently endorsed by a second endorser previously to endorsement by the payee in which, without his knowledge, his responsibility might not be varied. It is difficult, indeed, to see how any other construction can be put on the mere face of the paper. In *Kyner v. Shower*, 1 Harris 446, Chief Justice GIBSON evidently misapprehended the decision in *Taylor v. McCune*, which had not then

been reported, though he took part in it. He relies on it as establishing not merely that it might be shown by extrinsic evidence what the agreement was, but that when there is no evidence it is an authority to the payee to write over the name of the endorser any form of engagement he may see proper. *Taylor v. McCune*, on the contrary, expressly repudiated such a doctrine. In *Schollenberger v. Nehf*, 4 Casey 189, and *Fegenbush v. Lang*, Id. 193, which were both of them actions by the payee, the same principle was reasserted. In *Barto v. Schmeck*, Id. 447, which was a suit by a third person as endorsee or holder, the rule was reconsidered and reaffirmed. It was held that it was equally available as a defence against a third person as the original party; that it was a fraud for the payee to negotiate the note without himself assuming the responsibility of first endorser, and that whoever took the paper did so with enough upon its face to put him upon inquiry for the special agreement, if there was one. This case was again followed in *Shenk v. Robeson*, 2 Grant 372.

These determinations, however, all admit that when there is evidence of what was the special agreement or understanding of the parties, such an irregular endorser may be held liable according to its terms. "He means," says Chief Justice GIBSON, in *Kyner v. Shower*, "to give credit to the paper as an original promisor; but in what character or how far, whether as a surety absolutely bound for the redemption of it, or as a guarantor contingently bound, depends on circumstances." The cases thus far referred to were on transactions before January 1st 1856, when the Act of April 26th 1855, entitled "A Supplement to the Act for the prevention of Frauds and Perjuries, passed 21st day of March 1772" (Pamph. L. 308), went into effect. That act following the 4th section of the English statute, 29 Car. II., c. 3, provided that no action shall be brought "whereby to charge the defendant, upon any special promise to answer for the debt or default of another, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him authorized." The question of the liability of a party upon such an anomalous endorsement since the statute arose in *Jack v. Morrison*, 12 Wright 113, which was an action by the payee. He declared upon a contract of guaranty by the defendant, and that he had endorsed the note in pursuance



of it. It was held to be within the provision of the statute, and that the defendant's signature was not the requisite note in writing, for it imported only an endorsement of commercial paper, and made him liable as endorser only to subsequent and not to prior holders.

In view of the importance of the question, especially since the Act of 1855, we ordered it to be reargued as an open one before a full bench. Our unanimous conclusion is to adhere to these decisions. In settling, finally, what shall be the rule in this state there are, undoubtedly, considerations which weigh on either side. That the endorser did mean to assume a responsibility, and that not of a primary but secondary character, is to be deduced from the very act of writing his name on the back of a negotiable note. Nothing else can be inferred. He must be presumed to be acquainted with the law merchant, at least so far as to know that the name of the payee would also be necessary in order to transfer the title to a purchaser, and that regularly his name would stand first on the paper. This presumption might be rebutted by evidence if it was not for the statute. But as the statute imperatively compels the court to shut out any parol testimony of a guaranty or engagement to be liable to the payee for the payment of the note, which is the primary debt of the maker, and thereby "to answer for the debt or default of another;" the only conclusion which can be drawn from the circumstance of endorsement before the payee, is that the party intended to occupy the position of second endorser. He might well argue: this note cannot be discounted without the name of the payee upon it; and if it be written after my name it will not be an assignment to me, but to some subsequent holder. No bank or other cautious party will take it upon my responsibility, without an explicit understanding with me on the subject. In *Herick v. Carman*, 12 Johns. 160, SPENCER, J., said: "The fact of his endorsing first in point of time can have no influence, for he must have known, and we are to presume that he acted on that knowledge, that though the first to endorse, his endorsement would be nugatory unless preceded by that of the payee of the note."

It is said that the signature is an authority to the holder to write any engagement above it which is consistent with the agreement of the parties. But the question recurs, what was that agreement, and if oral, is it such as can be supported consistently

with the provision of the statute? If there was express evidence of authority to the payee to endorse "without recourse," then, indeed, the *prima facies* arising from the signature would be rebutted. If the second endorser allowed the paper to pass from his hands in such a condition that these words might be written with the endorsement of the payee above his name, then as to *bond fide* holders for value without notice, he would certainly be conclusively bound to answer as second endorser, but if sued by the payee in the character of a subsequent endorser, he undoubtedly could show that in fact such restricted endorsement was not made until after he had signed, and as to any liability to the payee it may well be questioned whether it would not be a mere evasion of the statute that was intended to prevent perjuries as well as frauds; and it would fail to accomplish this aim if the mere form in which the oral engagement is expressed should be allowed to make a distinction when the substance of it is still merely "a special promise to answer for the debt or default of another." To quarrel with the result in any case as unjust and contrary to the honest contract of the parties, is to quarrel with the policy and justice of the law. We are bound to execute the statute in good faith, and warned by the beacons, which stand all along the coasts of English jurisprudence, to beware of beginning to evade or make nice exceptions to the enactments of the legislature, which have led the English courts, both on the Statute of Frauds and Perjuries, and the Statute of Limitations, so far astray. *Obsta principis* is the true rule. We have begun in this spirit in regard to the Act of 1855. We must be careful not to be tempted to turn aside from it by the hardship of any particular case. Hard cases, it is often said, make bad precedents. But were there more doubt as to the soundness of the principle settled in *Barto v. Schmeck*, and *Jack v. Morrison*, than there is, we ought not now to depart from them. The commercial community, especially that part which deals in negotiable paper, will soon understand how the law is settled on this subject, and will govern themselves accordingly. To overrule these cases and establish any other rule would lead to worse consequences by creating the feeling that the point was still unsettled. "The traditional experience of the courts," as has been said by Lord ELDON, "does not furnish a wiser maxim than that which is contained in the short precept *stare decisis*:" 1 Bligh 24.

The only other question which we deem it our duty to consider, is as to the competency of the witness Jacob Shafer, Jr., one of the payees of the note, and who had also subsequently endorsed it. It is unnecessary to discuss his interest in the suit, as, interested or not, he was incompetent. It is now settled by *Baily v. Knapp*, 7 Harris 192, *Katz v. Snyder*, 2 Casey 511, and *Foreman v. Ahl*, 5 P. F. Smith 825, that the rule furnished by *Post v. Avery*, 5 W. & S. 509, is applicable to payees, who have transferred negotiable paper by endorsement. This renders immaterial all the questions which arose upon the testimony of the witness, who ought not to have been heard. Besides which, not one of the assignments of error is in accordance with the rules of court, and might, with propriety, be dismissed on that ground alone.

Judgment reversed, and *venire facias de novo* awarded.

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#### ABSTRACTS OF RECENT AMERICAN DECISIONS.

##### SUPREME COURT OF ALABAMA.<sup>1</sup>

##### SUPREME COURT OF CALIFORNIA.<sup>2</sup>

##### COURT OF APPEALS OF MARYLAND.<sup>3</sup>

##### SUPREME COURT OF PENNSYLVANIA.<sup>4</sup>

#### AGENT.

*When Agent may sue in his Own Name—Responsibility of Telegraph Companies for Failure to transmit Despatches.*—Where an agent is interested, as for commissions, or by reason of special property in the subject-matter, and the contract in reference thereto is made in his name, it is perfectly competent for him to sue and maintain an action in his own name as if he were the principal: *United States Telegraph Co. v. Gildersleve*, 29 Md.

This is so in the case of a factor, or a broker, or a warehouseman, or carrier, an auctioneer, a policy broker, whose name is on the policy, or the captain of a ship for freight: *Id.*

So where a contract is in terms made with an agent personally, he may sue thereon; and if an agent in his own name carry on a business for his principal, and appear to be the proprietor, and sell goods in the

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<sup>1</sup> From the Judges. The cases, which were decided at the January Term 1869, will be reported in 42 or 43 Ala. Rep.

<sup>2</sup> From J. E. Hale, State Reporter; to appear in 36 Cal. Rep.

<sup>3</sup> From J. S. Stockett, State Reporter; to appear in 29 Md. Rep.

<sup>4</sup> From P. Frazer Smith, State Reporter; to appear in 59 Pa. Rep.

trade as such apparent owner, he can sustain an action in his own name for the price: *Id.*

Where a broker sent by telegraph, in his own name, an order for the purchase of gold, on behalf of his principal, and the telegraph company failed to transmit the order. *Held*:—

1. That the broker may sue the telegraph company in his own name, on the contract to transmit the order, and recover the full amount of damages resulting from a breach of the contract. But that he of course sues and recovers as trustee for his principal:

2. That the company had a clear right to protect itself against extraordinary risk and liability, by such rules and regulations as might be required for the purpose:

3. That as the message was not required to be repeated, and there was no special agreement for the insurance of its transmission, the company, though bound to use due diligence, was not bound to use extraordinary care and precaution:

4. That, having refused to pay the extra charge for repetition or insurance, the broker had no right to rely upon the declaration of the company's agent, that the message had gone through, in order to fix liability on the company: *Id.*

In a suit by a broker against a telegraph company to recover the damages resulting from the failure to transmit a despatch containing the following order "*sell fifty (50) gold,*" it was proved that the despatch would be understood among brokers to mean fifty thousand dollars of gold, but it was not shown that the company's agents so understood it. *Held*, that the nature of this despatch should have been communicated to the company's agent at the time it was offered to be sent, in order that the company might have observed the precautions necessary to guard itself against the risk; and it was error to instruct the jury that the plaintiff was entitled to recover to the full extent of his loss by the decline in gold: *Id.*

#### BILLS AND NOTES.

*Notice of Dishonor sent through Post-Office.*—The free delivery of letters being established and regulated by law, it seems proper the rule in this state should be that where, as in cities, &c., there is a letter-carrier, who carries letters daily from the post-office and delivers them daily at the house and places of business of those who are accustomed to receive letters by him, if a notice of dishonor is left at the post-office in time to go by such carrier on the same day to the party, it will be deemed sufficient: *Shoemaker v. Mechanics' Bank*, 59 Pa.

#### CONFEDERATE STATES. See *Limitations*.

The so-called Confederate Government, and the rebel government in the state of Alabama, were neither of them in the proper legal sense *de facto* governments during the late rebellion: *Chisholm v. Coleman*, S. C. Ala.

The government in Alabama during that period did not, and did not claim to, exercise the powers of the loyal, rightful government of said state, under the Constitution of the United States, nor was it, nor did it claim to be, the government of said state that was admitted into the Union, under the laws and Constitution of the United States, in the

year 1819—did not claim or pretend to be that government—that government it destroyed. It claimed to be and was, a new, separate, and distinct government—a government forming, and being a constituent part and member of the said Confederate Government, in open and flagrant hostility to, and war against, the United States; and the said rightful government of said state: *Id.*

A government *de facto*, whose acts bind the rightful government, is a government that gets the possession and control of the rightful government, and maintains itself there by force and arms against the will of the rightful government, and claims to exercise the powers thereof: *Id.*

A judge of the Circuit Court of the state of Alabama, elected before the act of secession, who after that act enters the military service, and takes an office in the armies of the Confederate States, and receives the pay thereof, thereby forfeits and vacates his office of judge under the state of Alabama; and there was no necessity there should be any judicial proceeding to try and determine the fact of forfeiture and vacancy: *Id.*

The present legitimate loyal government of Alabama is not bound nor under any obligations, either moral or legal, to pay the salary of such judge while he was serving the illegal, rebel government in said state: *Id.*

#### CONSTITUTIONAL LAW.

*Right of Suffrage.*—A right conferred by the constitution is beyond the reach of legislative interference: *McCafferty v. Gnyer et al.*, 59 Pa.

The legislature cannot confer the right to vote upon any classes but those to whom it is given by the constitution; the description of those entitled excludes all others: *Id.*

The 3d article of the constitution is not merely a general provision defining the indispensable rights of an elector, leaving the legislature to determine who may be excluded. It is a description of who shall not be excluded: *Id.*

The Act of June 11th 1866 (for disfranchising deserters) is unconstitutional: *Id.*

#### CONTRACT.

*Consideration.*—In a suit against the owner of houses by a lumber merchant for lumber furnished to the contractor, evidence that at a settlement between the contractor and owner, the contractor admitted the owner's book to be correct, *Held* to be inadmissible: *Landis v. Royer*, 59 Pa.

Materials furnished on the credit of a building, are a sufficient consideration for the owner's subsequent promise to pay: *Id.*

A benefit derived from unsolicited services creates a moral obligation, which is a sufficient consideration for an express assumption, but will not raise an implied assumption: *Id.*

Materials for a building were furnished to a contractor on the credit of the building, and charged to him: there was evidence that the owner promised to pay for them. *Held*, that if the promise was a direct and absolute engagement to pay on a consideration moving to himself, and at the time the claim was a lien, it was the debt of the defendant's own building, whose payment could be enforced against it, and although not personally his debt, his promise was in relief of his property—not the

debt of another and not within the Act of April 26th 1855 (Frauds): *Id.*

#### DAMAGES. See *Agent*.

*Fraudulent Sale*.—A., being part owner of a vessel and authorized to appoint her master, agreed with B., who applied for the appointment, to appoint him, in consideration that he would take an eighth interest in the vessel at her *cost* price. A. fraudulently represented the cost price of the vessel to have been \$34,000, and received from B. the one-eighth part of that sum. B. subsequently learned that the cost price of the vessel was very much less than that which A. represented it to have been. *Held*:—

1st. That B. was entitled to recover from A. for the over-payment, even if the actual value of the share purchased equalled or exceeded what it would have been, had the representation been true:

2d. And that the measure of damages was either the difference between one-eighth of the actual and one-eighth of the represented cost of the vessel, or one-eighth of the difference between the actual and represented cost of the entire vessel: *Pendergast v. Reed*, 29 Md.

#### DEBTOR AND CREDITOR.

*Discharge of Insolvent*.—An express promise by a debtor, after his discharge under the insolvent laws, to pay a prior debt, waives the discharge: *Knight v. House*, 29 Md.

*Voluntary Payment*.—Where a person with full knowledge of the facts, *voluntarily* pays a demand unjustly made upon him, though attempted or threatened to be enforced by proceedings, it will not be considered as paid by compulsion, and the party thus paying is not entitled to recover back the money paid, though he may have protested against the unfounded claim at the time of payment made: *Lester v. The Mayor*, 29 Md.

Where money has been paid under a mistake of the facts, or under circumstances of fraud or extortion, or as a necessary means to obtain the possession of goods wrongfully withheld from the party paying the money, an action may be maintained for the money wrongfully exacted: *Id.*

But such action is not maintainable in the naked case of a party making payment of a demand rather than resort to litigation, and under the supposition that the claim which subsequently turned out to be unauthorized by law, was enforceable against him, or his property: *Id.*

*Security for future Advances*.—A judgment as well as a mortgage, may be taken to secure future advances and liabilities, when such is a constituent part of the original agreement under which it was entered; and any future advances not exceeding the amount of the judgment made thereunder, will be covered thereby: *Neidig, Administratrix of Neidig, v. Whiteford*, 29 Md.

A debtor has the right, if he so elect, to make the application of payments in the first instance, and if he omit so to do, the creditor may make the appropriation; but if neither make any appropriation, the law appropriates the payment to the earliest, and generally the most onerous debt: *Id.*

On the 24th of July 1856, W. confessed a judgment in favor of A., as collateral security for such balance as was due on account to the latter at the date of the judgment. There was a running account between the parties, commencing before the date of the judgment, kept alone by the creditor, and which continued until May 1857. Subsequently to the date of the judgment, large and numerous credits were entered in the account, greatly exceeding in amount the balance due on the account at the time the judgment was rendered. *Held*, that the judgment was discharged by the subsequent payments on account: *Id*.

#### EJECTMENT.

*Writ of Possession—Execution of.*—*Primâ facie* all who come into possession of the land, pending the action to recover possession, must go out under the writ of possession, if the plaintiff recovers, for the presumption is that they came in under the defendant: *Wetherbre v. Dunn*, 36 Cal.

If the defendant, pending an action against him to recover possession of land, colludes with another person to obtain judgment against him for possession, and to be placed in possession by a writ of restitution, such other person must go out under a writ of possession against the defendant. He will not be protected by his judgment, if it was collusively obtained: *Id*.

#### EQUITY.

*Relief from Contract on Ground of Mistake.*—Where parties have presupposed facts or rights to exist as the basis of their contracts, which did not, such contracts made in mutual mistake will be relieved against: *Watts v. Cummins*, 59 Pa.

The principle in such cases is, that the party has been misled to his hurt, in trusting to the truth of the other in a material matter, where he has had no opportunity of satisfying himself of its reality, or has been prevented from taking the steps necessary to verify the assertion: *Id*.

When a party asks a chancellor to restrain the inequitable use of a legal title, he must show such facts as entitle him to rescind on the ground of either mistake or fraud: *Id*.

The defendant who had given a note for a share in a tract of oil land defended, on the ground of misrepresentation. The judge below, after referring to the evidence, and the excitement in relation to such land, charged: "If Watts, the defendant, was seized with this oil fever, like multitudes of others, and was induced to subscribe by representations that Campbell, the agent of the owners of the land, believed to be true, a persuasion that was shared by the best informed men who visited and examined the territory, he cannot allege that he was deceived and defrauded by such representations. But if you can find evidence that Campbell made these representations knowing them to be false, and that he made them by the direction and authority of the owners, and for the purpose of obtaining Watts's note, and that Watts signed the paper and gave the note in consequence of these false representations, you will be warranted in rendering a verdict for the defendant." *Held*, not to be error: *Id*.

*Miles v. Stevens*, 3 Barr 21, explained: *Id*.

*Practice.*—If a defendant in a chancery suit is sought to be made a party, in his own right as heir at law, and as executor or administrator,

the bill should state the fact, and pray process against him in both characters, otherwise he will be held to be a party only in the character in which process is prayed against him: *Carter v. Ingraham*, S. C. Ala.

In such a case, if process is prayed against the defendant in one character only, the register has no authority to issue process against him in both; the process should follow the prayer in the bill of complaint: *Id.*

*Specific Performance—Demand for Deed, how far Material.*—In an action for the specific performance of a trust by the execution of a deed, a demand therefor before suit is only material as affecting costs. Without such demand the action may be maintained, but the plaintiff will not be entitled to costs: *Jones v. City of Petaluma*, 36 Cal.

### ESTOPPEL.

*Former Judgment.*—The judgment of a court of competent jurisdiction upon a material matter, put directly in issue by the pleadings, is *res adjudicata* as to that issue, and the parties are estopped by the judgment from litigating it again: *Jackson v. Lodge*, 36 Cal.

If the defence made by sureties to a promissory note is, that a deed to a tract of land has been given to the plaintiff by the principal to the note, in satisfaction thereof, and the case is tried on this issue, and judgment rendered for the defendants, this is *res adjudicata* as to that issue; and the same matter cannot be again litigated between the parties in an action to recover possession of the land: *Id.*

### EVIDENCE.

*Experts.*—In an action against the executors of her father on a note given to a daughter, the plea being *non est factum*, the will of the father dated before the note, stating as a reason for excluding her from any part of his estate, that she had received her share in a farm sold to her husband much below its value, was irrelevant, and inadmissible: *Rouch v. Zehring*, 59 Pa.

If the fact were material, it could not be proved by the declaration of the obligor: *Id.*

The plaintiff afterwards gave evidence to rebut the declaration in the will. *Held*, that this did not cure the error in admitting the will: *Id.*

The opinion of an expert must be predicated on facts proved or admitted, or such as appear in evidence hypothetically stated. One not an expert must give facts and circumstances within his own knowledge as the ground of his opinion: *Id.*

Declarations of the obligor, shortly after the execution of the note, that he had not signed it were admissible, not as evidence that he had not signed, but to show want of memory and understanding about what he had done: *Id.*

*Receipts.*—There is a distinction as to oral testimony, between solemn contracts *inter partes* in writing executed and delivered, and receipts, the acknowledgment of one party only: *Batdorf v. Albert*, 59 Pa.

Receipts, when mere acknowledgments of delivery or payment, are but *prima facie* evidence of the facts, and not conclusive: the facts may be contradicted by oral testimony: *Id.*



## EXECUTOR AND ADMINISTRATOR.

*Promise to Pay Legacy.*—There is no consideration for the promise of an executor to pay a legacy beyond the assets in his hands. The consideration and promise must be co-extensive: *Oakeson's Appeal*, 59 Pa.

An executor cannot be made liable *de bonis propriis* on an oral promise, on the mere consideration of assets: such promise would be within the Act of April 26th 1855 (Frauds): *Id.*

*Liability of.*—An administrator who fails to make and return an inventory of the estate he represents, as required by law, is subject to removal for such failure: *Oglesby v. Howard*, S. C. Ala.

An administrator who fails to collect the debts of the estate he represents when they become due, or collects the same in illegal and worthless funds, is guilty of a *devastavit*, and he is subject to removal for the same, unless a sufficient excuse is shown for such failure: *Id.*

## FEDERAL AND STATE COURTS.

*Transfer of Cause from a State Court to a Federal Court.*—This Court has no jurisdiction to grant a writ of mandate to compel the judge of a District Court to proceed with the trial of an action commenced therein, in which an order has been made by said District Court directing the cause to be transferred to the Circuit Court of the United States for trial, for the alleged reason that the parties thereto are citizens of different states: *Francisco v. Manhattan Ins. Co.*, 36 Cal.

In such case the subject-matter of said order of the District Court is within its jurisdiction, and is not void, even if erroneous. It cannot be reviewed by this court on application for *mandamus*. Moreover, the party aggrieved thereby has a plain, speedy, and adequate remedy by the due course of law: *Id.*

## FORWARDERS.

*Liability for Want of Ordinary Care and Diligence.*—H. delivered to the Central Ohio Railroad Company, at Newark, Ohio, two hundred and fifty barrels of coal oil to be transported to Bell Air in the same state, by the said company; thence by way of the Baltimore and Ohio Railroad to Baltimore, and thence by steamer to New York, there to be delivered to S., or his assigns. The oil was delivered to the Baltimore and Ohio Railroad Company at Bell Air, and reached Baltimore, where upon being taken from the cars of the company, it was placed in an open lot near their warehouse on Locust Point, and thence forwarded to New York, where upon its arrival, it was ascertained there was a deficiency in quantity of sixty-seven barrels. *Held*:—

1. That the responsibility of the proper custody and storage of the oil after it was unladen from the cars in Baltimore, attached to the Baltimore and Ohio Railroad Company, as warehousemen and forwarders, and they were bound to use ordinary care and diligence in its protection:

2. That S. was entitled to recover from the Baltimore and Ohio Railroad Company for such loss of the oil by leakage, while in their custody

after it was unladen from their cars, as was occasioned by their neglect or want of ordinary care as warehousemen and forwarders, as could be established to the satisfaction of the jury, by competent and admissible evidence: *B. and O. R. R. Co. v. Schumacher*, 29 Md.

FRAUDS, STATUTE OF. See *Contract—Executor*.

JUDGMENT. See *Debtor and Creditor—Estoppel*.

#### LIMITATIONS, STATUTE OF.

*New Promise made on Sunday—Act of Congress relating to the Confiscation of Property of Persons engaged in the Confederate Service.*—On the 23d of March 1861, A., a resident of Maryland, made his promissory note in favor of B., payable ninety days after date. B. passed the note away and entered the Confederate army, and did not return to Maryland till the war was over. Before maturity the note came into the possession of a bank in Baltimore, and at maturity was protested for non-payment, and remained in the possession and ownership of the bank until the war was ended. After the war B. again became the owner of the note for a valuable consideration, and brought suit on it against A., who pleaded the Statute of Limitations, to which B. replied a new promise, which at the trial was shown to have been made on Sunday.  
*Held:—*

1st. That the Code of Public General Laws, Art. 30, sec. 178, does not prevent the acknowledgment or new promise made on Sunday, from being used in evidence, for the purpose of removing the bar of the Statute of Limitations:

2d. That there was nothing in the Act of Congress of 1862, ch. 195, that could by any latitude of construction be held as intending to prevent a party situated as the plaintiff was, from purchasing notes or acquiring property after the close of the war, or as making such property liable to seizure and confiscation:

3d. Nor was it necessary that the plaintiff should have obtained a pardon or have complied with the provisions of the amnesty proclamation of the 29th of May 1865, before he could sue upon the note so acquired:

4th. That the plaintiff was entitled to recover interest upon the note pending the war: *Thomas v. Hunter*, 29 Md.

#### LIS PENDENS.

*Abatement of Action.*—In an action to recover land, an answer of another action pending for the same cause must show that the same title, the same injury, and the same subject-matter are in controversy in both actions: *Larco v. Clements*, 36 Cal.

#### MECHANICS' LIEN. See *Contract*.

*Repairs and Alterations.*—Repairs and alterations of a building, which do not fairly change its exterior into a new structure, cannot confer a lien: *Miller v. Hershey*, 59 Pa.

It is the extent and character of the alterations, and not the change of purpose, which makes the difference between an old or new building: *Id.*

Newness of structure in the main mass of the building—that entire change of external appearance which denotes a different building from that which gave place to it, though some parts of the old may have been retained—is that which constitutes a new building, as distinguished from one altered: *Id.*

The building should present that external change indicating newness of structure, which would put purchasers and lien-creditors upon inquiry: *Id.*

#### NUISANCE.

*Public and Private Nuisance.*—A public nuisance may also be a private nuisance, and if so, the person thereby injured may have his action: *County of Yolo v. City of Sacramento*, 36 Cal.

The diversion of the waters of a navigable stream may be both a public and a private nuisance: *Id.*

In so far as a wingdam in a navigable river obstructs the navigation, it is a public nuisance; but if it obstructs the reclamation of swamp lands, it is a private nuisance: *Id.*

The abatement of a nuisance, and the recovery of damages therefor, are not distinct causes of action, which cannot be united in the same complaint, but merely different kinds of relief to which the plaintiff may be entitled where a nuisance is the cause of action: *Id.*

#### PARTITION.

*Parties.*—In partition, all the tenants in common should be made parties. One tenant in common who owns an undivided interest consisting of a certain quantity, cannot have partition by making the original holder of the whole tract sole defendant, when he has sold divers parts thereof to various persons, but retains more than the quantity to which the plaintiff in the partition suit is entitled. All the grantees of the original owner should be joined as parties: *Sutter v. San Francisco*, 36 Cal.

#### PARTNERSHIP.

*Fraudulent Transfers of Partnership Property.*—While the members of a solvent partnership by their own acts may convert the joint property of the partnership into the separate property of individuals, or into the joint property of two or more partners, when done in good faith, such conversions or transfers, when fraudulent and calculated to hinder and delay the partnership creditors, are void as against such creditors and will not be allowed to operate to their prejudice: *Flack v. Charon*, 29 Md.

While it is true that the joint creditors, as such, have no immediate or direct lien upon the partnership property, yet they have a derivative or secondary lien that can be worked out and made effectual through the lien of the partners; and which *quasi* or secondary lien of the creditors, constitutes an equity, that courts will recognise and protect, against the meditated fraud of the partners themselves: *Id.*

And hence while the joint creditors have no right to impeach or call into question the *bonâ fide* sales or transfers of the partnership property, it has been uniformly held that it was necessary to the validity of such sales or transfers, as against the creditors, that they should be fair and *bonâ fide*; and where they have been found otherwise, they have been declared inoperative as against creditors: *Id.*

*Fraudulent Debt—Liability of Partners for.*—The fraudulent intent of a party to procure goods without payment is consummated when the possession of the goods is obtained without payment on delivery, or on call, according to the terms of sale. The debt, under such circumstances, is fraudulently contracted: *Stewart v. Levy*, 36 Cal.

In case of a debt fraudulently contracted by a partnership firm by one member alone, the others being ignorant of the fraud, while all the members will be bound in an action brought on the contract or to recover the property so fraudulently obtained, yet the liability to an action for the fraud which is essentially different and involves moral turpitude, is limited to the partner committing the same, unless the others assented to the fraud, or ratified it by adopting the act of the fraudulent partner, or retaining its fruits with knowledge of the fraud: *Id.*

PAYMENT. See *Debtor and Creditor*.

#### PUBLIC OFFICER.

*Liability of.*—Although public officers should be made to answer in damages to all persons who may have been injured through their malfeasance, omission, or neglect, yet if the damages would have been sustained notwithstanding the malconduct of the officer, or if the injured party has by his fault or neglect contributed to the result, the officer cannot be held responsible: *Lick v. Madden et al.*, 36 Cal.

#### SALE.

*Conditional Sale of Personal Property—Title.*—Where on sale of personal property the right to receive payment before delivery is waived by the seller, and immediate possession is given to the purchaser, and yet by express agreement the title is to remain in the seller until the payment of the price upon a fixed day, such payment is strictly a condition precedent, and until performance the right of property is not vested in the purchaser: *Putnam v. Lamphier*, 36 Cal.

It is a general rule, applicable alike to conditional and absolute sales, that a second vendee is not entitled to stand in any better situation than his vendor in regard to the title of personal property, other than negotiable instruments, and whatever comes under the general denomination of currency: *Id.*

#### STAMP.

*Unstamped Note.*—A promissory note, made since the 30th day of June, 1864, is not provided for in the Act of Congress of that date, and cannot be stamped in open court, and thus stamped, read as evidence to the jury: *Wigham v. Pickett*, S. C. Ala.

But such note is not void, unless it was left unstamped at the time it was made, with the intent to defraud the government of its revenue. Such fraudulent intent will not be presumed, but must be proved, as any other fraud is proved: *Id.*

Such note may be made available, as evidence, by having it stamped by the collector of the revenue of the proper district, under section 158 of said act: *Id.*

SUNDAY. See *Limitations*.

## TRUSTEE.

*Creditors of Trust Estate.*—Persons who have traded with and given credit to the trustee of a married woman's separate estate, cannot, in the first instance, go into chancery to have their debts paid out of the trust estate : *Pollard et al. v. Cleveland et al.*, S. C. Ala.

A trustee who is a member of a company, and as such member becomes the seller, and as trustee the buyer, for and on account of the trust estate, makes no exception to, but rather a reason for the necessity and propriety of the general rule : *Id.*

*Statute of Frauds as to Resulting Trust.*—Where A. agrees with B. that he will purchase from C., at a given price, a sheriff's certificate of sale, which C. holds, of a tract of land, and that B. shall furnish one-half of the money, and that the assignment of the certificate shall be taken in A.'s name, for the joint benefit of A. and B., and B. furnishes A. his proportion of the money, when in truth A. has already bought the certificate unknown to B. : *Held*, that A. is estopped from alleging that he had made the purchase before his agreement with B., and that on this ground said agreement is within the Statute of Frauds, and does not create a resulting trust : *Dikeman v. Norrie*, 36 Cal.

Where A. agrees with B. that he will purchase a sheriff's certificate of sale of a mining claim, and take an assignment in his own name for the joint benefit of both, and A. makes the purchase, B. furnishing his proportion of the money, and takes a sheriff's deed in his own name, a resulting trust arises, and A. holds a part of the property in trust for B. : *Id.*

Such resulting trust cannot be defeated by the fraud of A. in making this agreement and taking B.'s money, when in fact he had already, unknown to B., made the purchase : *Id.*

## VENDOR AND PURCHASER.

*Vendor's Lien.*—If the vendor deliver possession of the estate to the vendee before all the purchase-money is paid, equity recognises and will enforce a lien on the land as a security for such unpaid purchase-money ; and this is so whether the legal estate be or be not conveyed : *Schwarz v. Stein*, 29 Md.

Such lien exists independent of any special agreement, and as an incident to the contract of sale of real estate, and it exists not only against the vendee and his heirs and other privies in estate, but against those claiming as volunteers, judgment-creditors, and all subsequent purchasers for value, having notice that the purchase-money or any part thereof remains unpaid : *Id.*

Where the vendor, claiming the benefit of the lien, retains the conveyance and holds in himself the legal title, subsequent purchasers or mortgagees may be affected with notice of the lien for any balance of unpaid purchase-money : *Id.*

The general rule is that the purchaser of an equity is bound to take notice of all prior equities : *Id.*

Whether the lien has been waived is generally a question of intention to be determined from the special circumstances of each case ; and it is always incumbent upon the party resisting the lien, to show the facts which repel its existence : *Id.*

Where the deed was withheld until much the larger portion of the

purchase-money was paid, and a promissory note for the balance, with the endorsement of a third party thereon as security, was given; and the deed was then delivered to the purchaser, and he was thus clothed with the legal estate to deal with the same as he pleased. *Held*, that the lien was extinguished, and the vendor must rely alone upon the personal security taken for the balance of the purchase-money: *Id.*

Where the legal title has been conveyed to the vendee, and he has given his note with the responsibility of a third person endorsed thereon as security, the lien must be considered as having been waived or surrendered, unless there be an express agreement that it shall be retained: *Id.*

*Vendor's Lien—Against whom it may be enforced.*—A vendor's lien for the unpaid purchase price of land may be enforced against the vendee and his grantees who have notice of the vendor's equities: *Pell v. McElroy*, 36 Cal.

The fact of notorious and exclusive possession of lands by a stranger to a vendor's title, as of record, at the time of a purchase from and conveyance by such vendor out of possession, presumptively imparts notice to such purchaser of the equitable rights in the premises of the party in possession; and this presumption can only be rebutted on the part of such purchaser, or those claiming under him, by explicit proof of diligent and unavailing effort by the vendee to discover or obtain actual notice of any legal or equitable rights in the premises in behalf of the party in possession: *Id.*

The continued adverse possession of lands by the vendor after his formal conveyance of the legal title, is a fact in conflict with the legal effect of his deed, and is presumptive evidence that he still retains an interest in the premises, and is sufficient to put a purchaser upon inquiry, and subjects him to the rule applicable in case of the party in possession being a stranger to the title as of record: *Id.*

#### WILL.

*Charge on Land.*—"I give to Samuel the tract, &c., two horses, &c.; I bequeath to Margaret \$300, one bed and bedstead, to make her equal with the rest; I leave to Daniel's children \$30, to be divided equally between them; all my money or bonds to pay my debts, and then all my personal property to be sold and the money to be equally divided," &c. There was a deficiency of personal estate to pay all the legacies. *Held*, that Margaret's bequest was not charged on Samuel's land: *Okeason's Appeal*, 59 Pa.

No particular language is necessary to create a charge on land; the intention to charge is to be carried out whenever it is discoverable from anything in the instrument: *Id.*

*Commonwealth v. Shelby*, 13 S. & R. 354, *English v. Harvey*, 2 Rawle 309, explained: *Id.*

*Whether an Instrument is a Deed or Will.*—Ritter conveyed land in trust to be farmed, and from the proceeds to pay him an annuity during life, the remainder of the income to his wife for life: if he survived his wife all the proceeds to him for life; after the death of both, the land to be sold, a specified sum to be paid to three children named, and the residue to be divided amongst all the children of Ritter and

wife. *Held*, that the deed was not revocable nor testamentary : *Ritter's Appeal*, 59 Pa.

*What is.*—The following instrument: "I wish five thousand dollars to go to John C. Cole in the event of my dying intestate, and the balance of my property to go to Robert Beatie, to be disposed of by him as his judgment may dictate," if properly executed and witnessed, is testamentary in its character, and is a will : *Estate of Wood*, 36 Cal.

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BENEDICT.—United States District Court Reports. By R. D. BENEDICT. Vol. I. New York: Baker, Voorhis & Co. Shp. \$10.

BLATCHFORD.—Circuit Court Reports. By Hon. SAMUEL BLATCHFORD. Vol. 5. New York: Baker, Voorhis & Co. 1869. Shp. \$7.50.

BOYCE.—Manual of Practice in the Circuit Courts of the United States. By A. A. BOYCE. Albany: W. C. Little & Co. Shp. \$6.50.

BRIGHTLY.—Digest of Pennsylvania Statutes for 1869. By F. C. BRIGHTLY. Philadelphia: Kay & Bro. Pap. \$2.

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' DECEMBER, 1869.

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## THE JUDICIAL SYSTEM OF FRANCE.

FRANCE, with a population of 37,000,000, is divided into 86 departments; each department is divided into districts, or, as they are called, *arrondissements*, of which there are 363, in each of which is a court, known as the Tribunal of First Instance, making 363 of these courts.

Each district is divided into cantons, of which there are 2847, each canton into communes or parishes, of which there are 36,819. In each canton there is a justice of the peace, who decides summarily, without the intervention of attorneys, all matters in contests of small importance, and has jurisdiction in criminal matters where the fine imposed does not exceed fifteen francs (\$3), or where the imprisonment is for five days or less. The Tribunal of Justice of the Peace also acts with the consent of parties as a court of conciliation. There are 2847 justices of the peace. They are all salaried officers, and are professional men. The *maires* of communes also exercise, it would seem, some judicial authority. The appeal from the decision of the Tribunal of the Justice of the Peace, is to the Tribunal of the First Instance of the district.

### TRIBUNALS OF FIRST INSTANCE.

The Tribunal of the First Instance is composed of from three to twelve judges, according to the population of the district. If



the court has seven or more judges, it is divided into two chambers, one of which has charge of criminal and the other of civil matters.

If the court has twelve judges, it is divided into three chambers, two civil and one criminal. The Tribunal of First Instance at Paris being very large, is divided into ten chambers. It has one procureur imperial, or attorney-general, with twenty-two deputies, and one registrar, with forty-two deputies.

The concurrence of *three* judges of a chamber, in this court in civil cases, and of *five* in criminal cases, is necessary for a decision.

One of the judges of this tribunal is appointed to act in the district for three years as a judge of criminal instruction. There is usually one to every criminal chamber, and attached to the Paris Tribunal of First Instance there are eleven. This judge, in conjunction with the procureur imperial (district attorney), examines every case of criminal accusation, and makes his report once a week to the criminal chamber of the Tribunal of First Instance, and that body, which must be composed of at least five judges, decides whether the party accused shall be discharged or not. If they decide that he shall not be discharged, they send the case to the criminal chamber of the Court of Appeal of the jurisdiction for further examination, and if that body think that a crime has been committed, and that it is of sufficient gravity, they send the case to the Court of Assise of the department to be tried by a jury.

The decisions of the Tribunals of First Instance are reviewable in the Court of Appeal of the jurisdiction.

The judges are appointed for life.

#### COURTS OF APPEAL.

There are twenty-seven Courts of Appeal in France, now called Imperial Courts, each of which takes its name from the city or place where it is established. Each court is divided into chambers, corresponding usually with the number of departments over which the court has jurisdiction; so that in the twenty-seven courts, there are eighty-six chambers, that being the number of the departments in France.

Each Court of Appeal is composed of at least twenty-four judges, who are called counsellors, and is usually divided into

three chambers, one having cognisance of civil cases, one of criminal accusations, and the other of appeals in police matters. In the civil chamber, seven judges must concur in a decision, and in the chamber of accusation, five. There is one general president, and a president for each chamber, who is selected by the judges of that chamber.

The Court of Appeal in Paris has six chambers, a first president, six presidents of chambers and fifty-nine judges.

In important matters, such as questions of state, or very difficult questions, two chambers, where there are more than one, are united, and the decision must be concurred in by fourteen judges. This is termed the solemn hearing, and is called by the first president of his own motion or by him, upon the request of one of the chambers, in a matter which they deem of sufficient importance.

The appeal from this court is to the Court of Cassation, and must be brought within three months.

The judges are all appointed for life, but may retire or be retired upon a pension after thirty years' service, or in the event of permanent infirmity.

#### COURT OF ASSISE.

There is also a Court of Assise, composed of judges of the Court of Appeal in each department (or eighty-six in all), for the trial of criminal cases with a jury. Where the seat of the Court of Appeal is within the department, the Court of Assise of the department is held by three of the judges of the Court of Appeal, the senior judge being president, and when such is not the case the Court of Assise is held by one judge of the Court of Appeal, and two judges of the Tribunal of First Instance of the district where the Court of Assise is held; the judge of the Court of Appeal being president.

The Court of Assise is held every three months, usually at the chief town of the department. The one in Paris is held twice every month. The trial is public; the jury is composed of twelve; they pass only upon the facts, and a verdict by the majority is sufficient. The appeal from the judgment of the Court of Assise is to the Court of Cassation, and must be brought within three days.

## TRIBUNALS OF COMMERCE.

There are in all the commercial towns and cities in France what are known as Tribunals of Commerce. The number or the locality of these courts is not fixed by law, but is determined by the government, according to the exigencies of each locality. This court takes cognisance only of disputes and transactions between merchants, tradesmen, bankers, or of matters connected with trade or commerce, in which is included bankruptcy. It is composed of a president, of judges and of supplemental judges. The number of the judges must not be less than two nor more than fourteen. The number of supplemental judges is in proportion to the exigency of the public service. The number of each in each tribunal is fixed by a government regulation. The judges of this tribunal serve for two years, without compensation, and are elected by an assembly of the most eminent commercial men within the district, the list of the electors being prepared by the prefect of the department, and approved by the minister of the interior. Any commercial man thirty years of age, who has exercised his calling with honor and distinction for five years, may be elected either as a judge or a supplemental judge. The president must be forty years of age, and be chosen from among those who have served as judges. Three judges, at least, must concur in a decision. If the amount involved is under 1500 francs (\$300) there is no appeal, nor in any matter, if the parties give their consent to abide by the decision without appeal. In all other cases an appeal lies to the Court of Appeal within the jurisdiction, and takes priority in the court over other appeals.

In the Tribunal of Commerce in Paris, there were in the year 1853, 51,042 cases, of which 35,257 went by default, 10,465 were put at issue, 2663 were conciliated, and 1985 were withdrawn. This tribunal has a general president, ten judges and sixteen supplemental judges. It is in session every day throughout the year except Sundays, and is one of the most useful courts in France.

## COURT OF PRUDHOMMES.

(*A Mechanic's or Workingman's Court.*)

There is in the cities of Paris and Lyons, and in some of the other cities, a court called *The Court of Prudhommes* (literally

good and true men, but meaning in this connection men well versed in some art or trade). It takes cognisance of all contests between manufacturers or master workmen, and their workmen and apprentices. It acts first as a court of conciliation, and if that fails, it has jurisdiction to the amount of 200 francs (\$40), without appeal, and jurisdiction to any amount subject to appeal to the Tribunal of Commerce, if there is one in the district, and if not to the Tribunal of First Instance.

This Court of Prudhommes consists of a council composed of master-workmen or manufacturers, and of foremen, being six of each, equally balanced; one-half of each of which go out every two years, but are re-eligible. They are elected by the members of their respective classes. To them is added a president and two vice-presidents, appointed by the sovereign for three years, but who are re-eligible.

This is a very practical and most useful tribunal. It sits every day except Sunday, decides cases with great despatch, with little expense, and generally to the satisfaction of both parties. They are usually settled by conciliation. There are in the Paris Tribunal about 4000 cases in the year, two-thirds of them relating to wages. The judgments seldom exceed one hundred annually, and appeals are rare.

#### COURT OF ACCOUNTS.

The next court is the Court of Accounts. It is a court of exchequer, before which matters come relating to the public expenditure, all fiscal matters, claims against government, the administration of poor-houses, hospitals, public charities, &c. It has a first president, three presidents, eighteen counsellors or masters of account, and eighty referees, divided into two classes, a registrar and deputies and three chambers, each of which have separate duties. The appeal from this court is to the Council of State.

#### COURT OF CASSATION.

The last and highest of the permanent courts of France is the Court of Cassation. It is composed of fifty judges, called counsellors, and is divided into three chambers, one of request (matters arising upon petition), one civil, and one criminal and police. It has a first president and three presidents of chambers.

It is the final appellate court from all intermediate tribunals of last resort, such as the Courts of Appeal.

An appeal to it must be brought within *three* months after the judgment appealed from was rendered.

It does not, as the Courts of Appeal do, review the merits, but as its name imports, breaks the judgment, if the forms of procedure have been violated, or the judgment is founded upon an erroneous interpretation of the law, and sends the case back for another hearing, usually to a different tribunal, but one of the same rank, as the one that first decided it. The court to which it is sent, is not, as our inferior courts are, bound by the interpretation given to the law by the higher tribunal, but may make the same decision as the former tribunal, if it thinks that the decision of the Court of Cassation was erroneous, though, of course, great deference is paid to the opinion of the higher tribunal. Instances have occurred in which three different courts of appeal rendered the same judgment notwithstanding it had been twice declared by the Court of Cassation to be erroneous. Where such is the case, the question is no longer agitated, but the government (the Corps Legislatif), with the sanction of the emperor, makes a decree declaratory of the law, which is binding thereafter upon all judicial tribunals.

The appellant must deposit 150 francs (\$30), which he forfeits to the other party if he fails, and is sentenced in addition to pay 300 francs (\$60), to the state.

No chamber of the Court of Cassation can give judgment unless it is composed of seven judges, including the president.

Each chamber appoints its own president, and five members go out of each chamber every six months, but not until they have finished all the matters heard before them. The Civil Chambers sit every week day except during the months of September and October; the Criminal continuously throughout the year, and the session is four hours a day.

In great or very important cases, the three chambers are called together by the first president of his own motion or upon the request of one of the chambers. The judges are robed in scarlet upon the occasion, and when they come together it is the most imposing and dignified judicial body in the world.

The judges of the Court of Cessation are appointed for life, and

are retired in the same manner as the judges of the Courts of Appeal.

### HIGH COURT OF JUSTICE.

The highest court in France is the High Court of Justice, which assembles only when an imperial decree is issued for its convocation for the trial of offences against the life of the sovereign or the safety of the state. It is composed of five judges and five supplementary judges, chosen from the judges of the Court of Cassation, and of a jury of thirty-six chosen from the members of the councils general of the departments. The judges and the jury are appointed annually by the sovereign.

The foregoing is a concise but accurate and full statement of the whole judicial organization of France. It does not however embrace any changes that may have been made during the past ten years, as the writer has not had facilities for ascertaining what laws or decrees have been enacted within that period. It may be added that the civil judicial organization of France is regarded as very perfect, and that the jurists of no country have done more to advance the science of jurisprudence.<sup>1</sup>

C. P. D.

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<sup>1</sup> The jurisdiction of the Imperial Court of Paris embraces seven departments—Aube, Eure-et-Loire, Marne, Seine, Seine-et-Marne, Seine-et-Oise, Yonne—comprising thirty-one districts, the united population of which in 1861 was 3,847,218.

The population of the state of New York in 1865 was 3,831,500, being 5718 less than the portion of France above referred to, and as the portion of France includes the principal city in France, Paris, and this state the principal city in the United States, a comparison of the two will serve to show the relative judicial force of this state as compared with that of France.

#### *New York.*

Judges of the Court of Appeals, . . . . .	4
“ Supreme Court, . . . . .	33
“ Superior Court of New York, . . . . .	6
“ “ “ Buffalo, . . . . .	3
“ New York Common Pleas, . . . . .	3
“ Marine Court of New York, . . . . .	3
“ City Court of Brooklyn, . . . . .	1
County judges, . . . . .	60
Surrogates, . . . . .	26
Special surrogates, . . . . .	7
Special judges, . . . . .	14
Recorders and city judges of New York, . . . . .	14
Judges of sessions, . . . . .	120
Total, . . . . .	295

## RECENT AMERICAN DECISIONS.

*Supreme Judicial Court of Maine.*

## GEORGE W. PRENTISS v. ELISHA W. SHAW ET AL.

The plaintiff was unlawfully seized by the defendants, carried thence three miles and confined in a room several hours, and thence to a town meeting, where he took an oath to support the Constitution of the United States, and was discharged. In the trial of an action of trespass, based upon these facts, the plaintiff claimed, (1.) Actual damages resulting from his seizure and detention; (2.) Damages for the indignity thereby suffered; and (3.) Punitive damages. *Held*:—

1. That the plaintiff was entitled to recover full pecuniary indemnity for the actual corporeal injury received, and for the actual damages directly resulting therefrom, such as loss of time, expense of cure, and the like; •

2. That the declarations of the plaintiff, made prior to the unlawful arrest and tending to provoke the same, not being a legal justification thereof, are inadmissible in mitigation of the actual damages; but,

3. That such declaration made on the same day, and communicated to the defendants prior to such arrest, together with all the facts and circumstances fairly and clearly connected with the arrest, indicative of the motives, provocations, and conduct of both parties, are admissible upon the question of damages claimed upon the other two grounds.

## ON EXCEPTIONS.

The writ was dated June 15th 1867, and contained a declaration in trespass, substantially alleging that Elisha W. Shaw (a deputy sheriff), Putnam Wilson, Jr., Oliver B. Rowe, Hollis J.

*Imperial Court of Paris.*

Judges of Appeal,	63
“ Tribunal of First Instance, in the city of Paris,	65
“ the other Districts,	216
“ Tribunal of Commerce,	27
“ Court of Prudhommes,	15
“ Proportional part of the Court of Cassation,	5
Total,	391

## RECAPITULATION.

Territory of Imperial Court of Paris (judges),	391
State of New York (judges),	295
	96

In this comparison justices of peace in both are omitted, as the number in this proportional part of France could not be ascertained, nor the number of judges of tribunals of simple police, though both are known to be proportionally greater than in New York.

Rowe, and Daniel Dudley, on the 15th April 1865, at Newport, with force and arms, assaulted, beat, and bruised the plaintiff, thereby permanently injuring his hip and back, violently forcing him into and locking him in a room in the Shaw House, subjecting him to remain there five hours, violently taking from thence into a carriage and carrying him against his will to the town-house in Newport.

The plaintiff introduced evidence tending to show that in April 1865, while he was at a blacksmith's shop in Newport, where he was having his horses shod, Shaw, Dudley, Wilson, and H. J. Rowe seized him, and forcibly putting him into a wagon, transported him a prisoner three miles distant, to Newport village, and confined him for several hours in a room in the hotel there; that a crowd of men accompanied the four defendants to the shop and from thence to Newport village; that the four defendants inflicted injuries upon the person of the plaintiff; and that threats of extreme personal injuries were made to the plaintiff, both at the blacksmith shop and at Newport village, by some persons.

There was conflicting testimony as to the extent of the injuries to the plaintiff's person.

The defendants, against the objections of the plaintiff, introduced evidence tending to show that the four defendants seized the plaintiff in the forenoon of the day on which the news of the assassination of President Lincoln was received; that when the plaintiff stepped into the blacksmith shop he, addressing one Gilman (who was a witness in this case), said: "He that draweth the sword shall perish by the sword, and their joy shall be turned into mourning;" that Gilman (alluding to the assassination of the President) said to the plaintiff: "I suppose there are some who are glad of it;" that the plaintiff thereupon replied: "Yes; I am glad of it; and there are fifty more in town who would say so if they dared to;" that Gilman rejoined that the plaintiff would be glad to take those words back; that the plaintiff responded substantially that he would not; and that Gilman thereupon informed the plaintiff he should report him.

On cross-examination, Gilman testified that he thought that the plaintiff, when speaking of the assassination, said it might stop the further effusion of blood.

Against the objections of the plaintiff, the defendants also introduced evidence tending to prove that the blacksmith shop



was three miles from Newport village, where three of the defendants were; that Gilman, in about twenty minutes after his conversation with the plaintiff, told it to the defendant Wilson; that Gilman and Wilson went to Newport village and informed the four defendants of the plaintiff's declarations concerning the assassination; that, about two hours afterwards, the four defendants proceeded to the blacksmith shop and did the act proved by the plaintiff; that there was great excitement in the public mind upon the receipt of the news of the assassination.

The plaintiff seasonably objected to the admission of the alleged declarations of the plaintiff, made to Gilman that day; but the presiding judge ruled that the plaintiff's declarations made that day, concerning the assassination of the President, might be given in evidence *de bene esse*, it having been stated by the defendants' counsel that they should prove the same had been communicated to the defendants before their arrest of the plaintiff.

Against the objections of the plaintiff, the defendants also introduced evidence tending to prove that, after the confinement of the plaintiff in the hotel, he was taken by them, on the same day, to a public meeting of the citizens, called at the town-house, at which a moderator and clerk were chosen, and acted officially; that, at the meeting, a vote was passed that the plaintiff be discharged upon his taking an oath to support the Constitution of the United States; and that the plaintiff voluntarily took such oath and was thereupon discharged.

The defendants also introduced evidence tending to show, that, before arresting the plaintiff, telegraphic communication, relative to the plaintiff's declarations concerning the assassination, was had with the provost-marshal at Bangor, who replied by telegraph, that he should be arrested and held; that thereupon the defendant Shaw, then an acting deputy sheriff, with three other defendants, acting under his orders, proceeded to make the arrest; and that they honestly believed that they had a legal right to do what they did, and had no malice towards the plaintiff.

As to the four defendants proved to have been present (and the other, if found to have participated), the presiding judge instructed the jury that the defendants had shown no legal justification for their acts, and must be found guilty; that the only question for the jury was the amount of damages; that the plaintiff claims damages on three grounds:—

1. For the actual injury to his person and for his detention ;
2. For the injury to his feelings, the indignity, and the public exposure ; and,

3. For punitive or exemplary damages.

. That they were bound to give, at all events, damages to the full extent for the injuries to the plaintiff's person and for his detention.

That, as to damages for the second and third grounds, it was for the jury to determine, on the whole evidence, whether any should be allowed, and the amount.

The presiding judge explained to the jury the nature and grounds of such damage, and instructed them, *inter alia*, that they could only consider the evidence introduced by the defendants under the second and third heads above set forth, and in mitigation of any damages they might find under either or both of said heads, if, in their judgment, those facts did mitigate such damages ; but that they could not consider them under the first head.

The jury acquitted O. B. Rowe, and found a verdict of guilty against the other defendants, and assessed damages in the sum of \$6.46. Whereupon the plaintiff alleged exceptions.

*W. H. McCrillis*, for the plaintiff, contended, *inter alia*, that the language of the plaintiff was not a sufficient provocation. It was not personal to any of the defendants : *Corning v. Corning*, 2 Selden 97 ; *Ellsworth v. Thompson*, 13 Wend. 658.

Sufficient provocation cannot be proved in mitigation when the assault and battery were deliberately committed. The assault must accompany the provocation before the blood has time to cool. The question is, was there time for a reasonable man to reflect, and not whether the defendants continued in a state of passion : *Cope v. Sullivan*, 3 Selden 400 ; *Avery v. Ray*, 1 Mass. 11 ; *Lee v. Woolsey*, 19 Johns. 319 ; *Willis v. Forrest*, 2 Duer 318.

Words cannot constitute justification. Words can never be sufficient provocation. They may provoke extreme anger, and the anger be admitted in mitigation. But, if the blood has time to cool, the assault is regarded as deliberately done and cannot be mitigated. Any other rule would be subversive of the order of society.

*L. Barker*, for the defendants.

KENT, J.—The case, as presented to the jury under the rulings, was, in substance and effect, one where a default had been entered and an inquisition of damages had been allowed before a jury. The jury had no discretion allowed to them, except as to the amount of damages to be inserted in a verdict for the plaintiff. The main question is whether the directions given by the judge to the jury to govern them in the assessment of damages were correct.

The plaintiff claimed damages for several distinct matters, and asked that the jury should found their verdict on these principles, viz. :—

1. The actual injury to his person and the detention and imprisonment.

2. The injury to his feelings, the indignity and public exposure and contumely.

3. Punitive or exemplary damages in the nature of punishment, and as a warning to others not to offend in like manner.

The judge very unequivocally instructed the jury that the defendants had shown no legal justification for their acts, and must be found guilty, and that the only question for them was the amount of damages,—that they were bound to give damages at all events for the injuries to the plaintiff's person, and for detention to the full extent of said damages; that they could not consider the testimony put in by defendants in mitigation of such actual damages, but must give a verdict for matters named under the 1st head to the full amount proved without diminution, on account of any matters of provocation, or in extenuation.

The judge further instructed the jury that they might consider the testimony put in by defendants under the 2d and 3d heads, above stated, in mitigation of any damages they might find the plaintiff had sustained under either or both of said grounds.

These rulings present the question whether the evidence objected to was admissible for the special purpose to which it was confined. It was not in the case generally, but its consideration and application was restricted to the special grounds of damages set up beyond what may properly be termed the actual damages. It was entirely excluded as a justification, or as mitigating in any degree the actual damages.

The distinctive points of the rulings which perhaps distinguish them from some cases in the reports, and some doctrines in the

text-books, are, first, that they exclude entirely this species of evidence in mitigation of actual damages,—and, secondly, that they admit it in mitigation of damages, claimed on the other grounds of injury to the feelings, indignity, and punitive damages, although the evidence related to matters which did not transpire at the instant of the assault, but on the same day, and manifestly connected directly with the infliction of the injury complained of.

It is unquestionable that many authorities can be found which seem to negative the proposition that acts or words of provocation, except those done or uttered at the moment, or immediately connected in time with the infliction of the injury, can be given in evidence in mitigation of damages. But most of these cases seem to be predicated upon the idea of mitigation of the positive, visible damages,—those damages to which the party would be entitled on account of the actual injury to his person or his property.

It is important to settle, as well as we can, the general principle which lies at the foundation of the law applicable to damages, occasioned by the illegal acts of the defendant. We understand that rule to be this—a party shall recover, as a pecuniary recompense, the amount of money which shall be a remuneration, as near as may be, for the actual, tangible, and immediate result, injury, or consequence of the trespass to his person or property. But, in the application of this general principle, there has been great diversity in the decisions, and in the doctrines to be found in the text-books touching the point of mitigation or extenuation.

In reference to injuries to the person, it was soon seen that this literal and limited rule, if applied inexorably, would fail to do justice. The case is at once suggested, where an assault and battery is shown to have been wanton, unprovoked, and grossly insulting; inflicted clearly for the purpose of disgracing the recipient, and at such a time or place as would give publicity to the act, and yet the actual injury to the person very slight, or hardly appreciable. Shall the law, in such a case of wanton insult and injury, give only the damages to the face or the person, as testified to by a surgeon?

On the other hand, a case is suggested, where the injury to the person was severe, a broken limb or grievous wounds, or permanent or partial disability, and yet the party suffering had been

guilty of gross abuse, provoking the assault by insulting language or false accusations, or most offensive libels upon the defendant or his family, or had outraged the community in which he lived, by a series of acts or declarations which justly aroused and kept alive the indignation, which at last found vent in the infliction of some personal indignity, accompanied by force and violence, which resulted in the serious manner above stated. What is the rule as to such damages, applied to the aggravations in the one case, and the mitigations in the other?

If we take the case of such an assault, which has been provoked by words or acts at the time of the trespass, and so immediately connected therewith that all authorities would agree in admitting the evidence in mitigation, the precise question then is, for what purpose can it be used, and what damages can it mitigate?

All agree that these facts cannot be a legal justification, and be used in bar of the action. The plaintiff is undoubtedly entitled to a verdict, with damages. It is said these facts may be used to mitigate the damages. But what damages? If the assault was illegal and unjustified, why is not the plaintiff, in such case, entitled to the benefit of the general rule, before stated—that a party guilty of an illegal trespass on another's person or property, must pay all the damages to such person or property, directly and actually resulting from the illegal act? Admit that the defendant was provoked, insulted, irritated, and justly indignant at the acts or language of the plaintiff. If those provocations did not reach the point of a legal justification of the assault, then, so far as the question arises for which party the verdict shall be given, they are immaterial, and out of the case. The assault was wholly legal or wholly illegal. There can be no such thing as apportioning the guilt; making the act half legal and half illegal. It is not one of the class of cases where the suffering party contributed to the injury, and thereby lost his right of action. The contribution, to work that effect, must be co-operation in the doing of the act itself, which is complained of,—i. e., the assault and battery; or whatever the alleged specific act may be.

If then the act is confessedly an illegal one, and unjustified in law, why must not the defendant answer for and pay the actual

damages to the person? On what principle of law can he be exonerated?

In the case before us the presiding judge took this view. He made a distinction which has not often been attended to, between a recovery for the actual personal damage and loss of time and other direct injuries, and a recovery for other damages based on injury to the feelings, indignity, insults, and the like, and also on the claim for punitive damages.

Is there not such a distinction in law and common sense? Take the simple case of the meeting of two men in a public street. One addresses the other with opprobrious and insulting language, calling him a thief or a liar. The other, at the moment, naturally excited to almost uncontrollable anger, strikes a blow which breaks the arm of his antagonist. The law says the words were no legal justification for the blow. It was therefore a trespass and a wrong. What damages shall be awarded? Can they be more or less, according to the provocation on one side or the natural anger on the other? There is the broken arm, neither more nor less, with the pain and suffering and expense of cure, and the loss of time, all which are open and appreciable, and are the direct and immediate consequences of the legal wrong. If the law holds, as it does, sternly and unwaveringly, that the words are no excuse or justification, why should it "keep the word of promise to the ear but break it to the hope," by allowing a jury to evade the law, whilst in form keeping it by a verdict for nominal damages, which is in effect one in favor of the defendant? Why not say rather that the provocation might be shown in defence of the action, and that if the plaintiff morally deserved to suffer the injury by reason of his language, that should be a legal excuse? It seems to be a legal anomaly to say, true, it is an undefended, naked trespass and wrong, but no real damages or recompense shall be given. It is giving the benefit of a justification to what the law expressly says is no justification. The restriction of the rule to the provocation given at the time of the assault, does not obviate the objection that it is against a well-settled principle which gives real and substantial redress for every unjustified trespass. Where the trespass or injury is upon personal or real property it would be a novelty to hear a claim for reduction of the actual injury based on the ground of provocation by words. If, instead of the owner's arm, the assailant had

broken his horse's leg, in the case before stated, must not the defendant be held to pay the full value of the horse thus rendered useless? Or in case of trespass on land, can the actual damage be mitigated by showing that it was provoked by unfriendly or unneighborly words? Or in case of a damage at sea, could an intentional and unnecessary collision be mitigated, so far as the actual injury was in question, by proving that the navigator was insulted and irritated by taunting and exciting language from the deck of the injured vessel?

But there is no doubt that the law has sanctioned, by a long series of decisions, the admission of evidence tending to show on one side aggravation, and on the other, mitigation of the damages claimed. Verdicts for heavy damages have been sustained where the actual injury to the person was very slight or merely constructive, and other verdicts for merely nominal damages have been confirmed where the actual injuries were shown to have been serious. In the first class of such cases the plaintiff has not been restricted to proof of the injury to the person, but has been allowed to show the circumstances attending the act, and to have damages for the insult, indignity, injury to his feelings, and for the wanton malice and unprovoked malignity of the deed. And it is now settled, certainly in this state, that he may be allowed, in addition, exemplary damages in the way of punishment or warning to the transgressor and others.

Now this opens a wide field for uncertain or speculative damages for matters not tangible or susceptible of accurate estimation, but based upon principles and considerations different from those which determine the actual injuries as before described. These are such as lie patent, and require only a calculation of time lost, pain suffered, or the value of a permanently injured limb, or the like. But when the injury to the feelings, the insult, the mortification, the wounded pride, or, to sum up all in one word, the indignity, are pressed as grounds for pecuniary indemnity, super-added to the claim for punitive and exemplary damages, they evidently and necessarily require a consideration of all the facts in any way clearly and fairly connected with the trespass, and bearing upon the motives, provocations, and conduct of both parties in the controversy, which has culminated in an assault by one upon the other. How otherwise can a jury fairly estimate what should be awarded by way of punishment, or as a reasonable satis-

faction for injured feelings? These damages, as our law now stands, are made up of injuries partly private and partly public in their nature. If evidence of this nature, admitted to enhance the actual damages to the person, may be given, why should not the same kind of evidence be given by way of mitigation of damages claimed on such grounds?

If the plaintiff restricts himself distinctly to the single claim for the actual damages to his person, and the direct, tangible results therefrom, and expressly waives all claim beyond, it would seem that the defendant should be limited to matters strictly in defence or justification of his act, as in other cases of trespass. But if, as in this case, he claims beyond this, for injured feelings and for punishment, the question arises (which is the main question made by the plaintiff), what is the limit of the evidence which may be admitted in mitigation or extenuation? It is not denied that some evidence of this nature is admissible. The precise question is whether it is to be confined to what transpired at the time of, or in immediate connection with the act. If a party claims damages not merely for the naked assault, but for his wounded feelings, and seeks to inflame them by showing that he had been publicly insulted by opprobrious language used with the evident intent to degrade him in the eyes of his fellow-citizens, may not the defendant be allowed to show that the complainant had himself been guilty of using like words, or by his conduct and by insults and provocations had really been the cause of the assault? The plaintiff may have been passive and silent at the moment of the assault, whilst the defendant was violent and denunciatory, and, if no facts can be shown beyond those transpiring at that meeting, the plaintiff would present a case, apparently calling for exemplary damages, whilst, if the whole truth was brought out, the defendant would appear the least in fault, so far as regards provocation.

And so, if the plaintiff claims for damages of this nature, for an assault, not by a personal enemy, but by those whose indignation had been aroused in matters of a general and public nature, may not all damages, beyond those actually suffered in his person, be modified or affected by evidence of his acts or declarations, calculated to arouse a just indignation and disgust? Why should the man who has intentionally and grossly outraged decency, or aroused indignation by his violation of common humanity, be



allowed to recover for his injured feelings, and the public degradation to which he has been subjected? Or rather, why should not a jury be allowed to know all the facts, directly connected with the act, although not transpiring at the moment, and from them determine, whether any, and if any, what damages should be allowed beyond the actual injury to the person or property? If facts beyond the act are to be allowed to aggravate, why should not like facts be allowed to mitigate this class of damages? Where, for instance, a man had been guilty of frequent, indecent exposures of his person in public streets, accompanied by obscene language and gross insults to females, and had persisted in such a course, until a body of his townsmen, indignant and outraged, seized him and inflicted punishment, and carried him away and confined him for a day, or other like proceedings; and for this assault and battery and imprisonment an action is brought and a claim set up for recompense for injured feelings, indignity and for punitive damages. At the trial, he proves these acts,—rough handling, and degrading treatment, and personal imprisonment, and makes out a case of apparently inexcusable interference with his liberty and his person, and his sense of self-respect. The defendants cannot show that he did or said anything at the time of the arrest. But are they to be precluded from showing anything in mitigation of such a claim? The law is fully vindicated when it gives such a man his full, actual damages. When he asks for more, he opens a new ground for his opponent, who may well say you have no fair claim for damages on this ground, for your own conduct and language aroused the indignation which led to the acts complained of.

There is an instinct, or, if not quite that, a dictate of common sense, which it is neither wise, or hardly possible for the law to disregard,—that a man should not have pecuniary recompense for injured feelings or public degradation, when he has himself outraged the feelings of another, or so conducted as justly to excite public odium by open contempt of the decencies of life. The old legal requirement, that he that asks for redress “must come into court with clean hands,” at once occurs to us. The law will protect the hand from actual violence upon it, although it may sadly need ablution, but beyond this will require “a show of hands” before it will adjudge damages for an alleged defilement.

The ruling of the judge, in this case, was peremptory and

unqualified, that the evidence made out no legal defence, and that the verdict must be for the plaintiff "to the full extent of the damages sustained by the injuries to the plaintiff's person, and for detention."

If, after this ruling, the defendant had consented to a default, and the case had come before a judge to determine the damages, and the same claim for cumulative and exemplary damages had been made and pressed, would any judge have excluded, in the hearing before him, the evidence offered in this case? If he had, how could he determine the degrees of aggravation or extenuation, or come to any satisfactory conclusion on the matter of damages? As before said, the jury in this case were in the same condition, after the ruling, as a judge would have been after default.

When we consider the nature and the grounds of this claim for exemplary or punitive damages, it is difficult to see why the evidence of provocation or mitigation, if allowed at all, should be restricted to the time of the overt act. What happened then may, and generally would, give a very partial and insufficient view of all the circumstances which in truth belong to the matter in question, and serve to aggravate or diminish the injury to the feelings, or the malice of the act. Every one sees this at a glance.

We think it will be found, on a careful examination of the cases, that where this rule, limiting the evidence to what transpired at the moment, has been enforced, the claim was to diminish the damages for the actual corporeal injury and loss of time, and no distinction was made between those and exemplary damages. The reasoning to be found in this class of cases is very similar to that found in the decisions at common law, where the degree of guilt is lessened, and a different and distinct offence, of a less degree, is found by reason of proof of sudden and provoked anger; as where a homicide is reduced from murder to manslaughter. But, in such trials, these matters of provocation and sudden anger are introduced, not to mitigate a crime found or admitted, but are strictly matters in defence, and modify or give character to the act, in determining what crime has been in fact committed, and are used for that purpose. In such case it becomes important to know whether the act was the result of sudden passion, or whether there had been time for the passions

to cool. But in a civil action for trespass the liability of the party for actual damages does not depend upon the intent or state of mind of the trespasser. He may be liable, if his act was unlawful, although he did not intend to injure any one, and had no anger or ill-will towards the party whose person or property was affected by his illegal act. It is not the motive, or the feelings under which the legal wrong is committed, which determines the character of the act, or the amount of the actual damages resulting from it. It cannot be excused, if legally unjustified, by proof of sudden passion, or the absence of malice or wrong intent.

The analogy, if any, between civil actions and criminal prosecutions, is to be found in the determination of the extent of punishment in the one, and the amount of exemplary or cumulative damages in the other. Although in the trial of criminal cases the evidence may be limited to the time of the occurrence, yet every judge is aware that, in fixing upon the sentence to be awarded, he does not hesitate to hear evidence or statements as to facts and acts and declarations made or done anterior to such time—in order to ascertain, as well as he can, the mitigating or aggravating circumstances connected with the offence. So, in determining the amount of damages in a civil suit, beyond the tangible, as before explained—when there is no question as to the fact that a trespass has been committed, a limitation of the examination into what transpired at the moment would seem to fall far short of what reason and common sense would prescribe. It seems hardly just to require any tribunal to act and determine such questions, and to award damages in the nature of punishment, and withhold from it all knowledge of the facts which may fairly be said to give the moral character of the act, and the actual guilt of the respondent.

We are aware that great care must be taken to confine the examination to such matters as are clearly and directly connected with the acts, or give color or character to it. Mere evidence of general bad character,—or unpopularity, or of acts or declarations of ancient date, or not clearly and really part and parcel of the matter in question, must be excluded. But time is not of the essence of the principle, but fairly established direct connection, as cause or effect. It is impossible to accurately define the limits, so as to reach every case. But there can be no greater

difficulty in the application of this than of many other rules of law.

In the case at bar, the evidence was limited to the transactions of the day on which the assault was committed, and very evidently was of matters connected directly with the acts done. If it had been excluded, after the evidence on the part of the plaintiff had been heard, how could the jury have properly or understandingly determined what punitive damages should be given in vindication of outraged law, or for the indignity and injury to the feelings? They had a right to know, and the defendants had a right to place before them the true relations of the parties, and to show how far the act was wanton, malicious, vindictive, or unprovoked, or how far extenuated by the conduct, declarations, or provocations of the complaining party.

On the whole, after a full consideration of the case, and the cases, we think that the rulings of the judge were not erroneous, but give the rules on this subject which are practical, and in accordance with common sense and the general principles of the law.

Exceptions overruled.

CUTTING, DICKERSON, BARROWS, and TAPLEY, JJ., concurred.

This is one of that class of cases, where there existed at the time it occurred, and even at the present time, to some extent, there exists, a degree of unfairness, in judgment and opinion, which renders it extremely difficult to say anything which will be kindly received, or candidly weighed. But we feel compelled to say, that the facts of this case, placed beside the verdict of \$6.46, certainly do indicate a substantial failure of the suit, if not of justice. The jury must have treated the evidence given in mitigation of damages, as a substantial justification of the assault, battery, and false imprisonment, with all its incidents of humiliation and outrage. The verdict very clearly manifests an opinion in the mind of the court and jury, that the plaintiff was more in fault than the defendants—in short, that the conduct of the plaintiff was repre-

hensible, and that of the defendants excusable—and that, therefore, it was proper for the court to place its stigma upon the action. This is not said, indeed, in so many words, but it is fairly implied.

This is a result to which courts of justice should never come, except in the most unquestionable cases, where there is no pretence of anything more than a nominal breach of the law, and where the action is therefore clearly vexatious. And it is especially unbecoming for courts to fall into this view, out of respect for, or sympathy with, or dread of, an intensified partisan public opinion. It is the duty and the business of courts, to hold the scales of justice evenly and firmly between the most embittered partisans of contending factions in the state, when such become suitors before them.

We might better have no courts, than to have them echo the varying surges of an ever-changing and baseless public sentiment. In a case like the present, it would be far better to have the court instruct the jury, in so many words, that the plaintiff's disregard of the common courtesies and decencies of life, justified the defendants in inflicting such punishment upon him, as would teach him not to repeat the offence, and to conduct with more circumspection in the future, than to have left the case to the jury, in such a slipshod way, as to bring about the same result exactly, but without any technical violation of the rules of law. And we must say, it seems to us that the charge of the court below, and the opinion of the full court, although clearly not so intended, must have operated in that direction.

Possibly some may claim, that upon a nice construction, there was no error in law, and all agree that courts cannot be expected always to control the waywardness or the prejudices of juries. But this is generally urged, where courts desire to throw their own responsibility upon the irresponsibility of the jury. And it seems to us the charge to the jury, in this case, afforded the jury an excellent opportunity to punish the plaintiff, and at the same time to compliment the defendants for taking the plaintiff in hand, and applying the rules of Lynch law to him, in the summary mode they did. This was all very well, provided it were the business of courts to administer Lynch law, or to moderate the strictness of the existing law. But as that is not the fact, but the contrary, it seems a peculiarly unfortunate distinction which the court have attempted to make in this case, between compensatory and exemplary damages, and to allow of the mitigation of one and not of the other.

If there be, in fact, any such distinction in the law, it should certainly be

differently stated from what it seems to have been in the trial of this case, or it would be very likely to be misapplied by the jury, as it certainly was here.

The error in the charge seems to be in treating "the injury to the plaintiff's feelings, the indignity and the public exposure," as forming no part of the *actual damages* in the action. Nothing could be further from the truth; since these things not only constitute a portion of the actual damages, but the principal portion. It is scarcely possible to conceive any proposition more unjust or unreasonable—not to say absurd—than to suppose that in a transaction like that, through which the plaintiff was dragged by the defendants, that the actual "injury to his person and his detention" embraced all for which he was entitled to compensation under the head of actual damages.

It is not probable, indeed, that the plaintiff was of that delicate organization, that he would be likely to suffer any irreparable damage merely from the insult and indignity, for if so, he could not have said what he did. But there are many persons who, from similar treatment, might have been ruined for life; and the rule of law is the same in all such cases. And there is no case, except the present, so far as we have noticed, which attempts to discriminate between corporeal and external injuries, and those which affect the sensibilities. These latter, are those which form the chief ingredient of damages in this class of actions. If these latter are to be excluded from consideration, or justified by *public sentiment*, there might better come an end of all pretence of the administration of justice. It is the direct and sure mode of encouraging a resort to force for remedy and redress.

We know that some very able writers, and among them the late Prof. Greenleaf (2 Evidence, § 253 and n. *et seq.*), contend for the rule, that in no case are

exemplary or punitive damages to be given, but that in all cases they should be confined to making *compensation* to the plaintiff. But no writer, or judge, to our knowledge, has ever before attempted to limit the actual damages to which the plaintiff was in all cases entitled *by way of compensation*, to loss of time and injury to the person, in cases of trespass and false imprisonment. Mr. Sedgwick (Dam. 665, n. 1), says, that "all rules, or rather definite principles of damages in civil actions, must be referred either to compensation or punishment." No one, we suppose, would for a moment deny that the plaintiff, in an action of this character, is entitled to recover damages for "the injury to his feelings, the indignity, and the public exposure;" and it would seem to be equally improbable, that any one should hold, that such damages were in the nature of punishment to the defendant, and only recoverable under that head.

The truth unquestionably is, in the present case, that the court have mistaken the application of their own rule, and thus, as it seems to us, have presented the whole case in a most unfortunate aspect—very much in that of an excuse and an apology, if not a full justification of Lynch law, than which nothing could have been further from its intention.

We hope no one will be simple enough to suppose that we feel any other than the most unqualified disgust and contempt for such sentiments as were expressed by the plaintiff, on the occurrence of the most disgraceful, as well as the most unfortunate event, which has ever occurred in our past history. The only possible mode of accounting for such folly, in speech, is that folly on one side naturally leads to counter folly upon the other, and despotic public opinion naturally provokes foolish words. But we trust it is not needful to inform the

profession, and especially the courts, in this country, that the high privilege of free speech is not created, or maintained, for the exclusive, or the chief benefit of wise and discreet men. They will do very well without any such protection. But it is intended for the protection of every class of the most ranting fools, and the vilest blackguards, and the most infamous blasphemers, except as they are liable to some restraint by the firm and wise administrators of the criminal and civil law of the land. These are the only men who require protection at the hands of the administrators of the law; and when we allow ourselves to be cheated with the delusion that the simple and degraded, or the offensive and coarse-grained, do not deserve the highest protection of the law, we approach a point of timeserving, which is but one degree removed from actual corruption, of which we already begin to hear charges, in some quarters, but we trust wholly without foundation.

We regret, in this case, the affirmance of the principles of the charge in the court below by a court of such high character, although done in a mode, and for reasons, which show the high dignity and purity of the tribunal, and do also show, as it appears to us, that an unfortunate misapplication of the very principle upon which the case is decided, must have occurred in the court below. We know the learning and ability of the court from which the decision comes; and we are always proud to welcome its members among our most esteemed friends; but we cannot shut our eyes to the fact, that the substantial damages in this action were blinked out of sight, and disregarded by the jury, upon grounds which are flagrantly in violation of the leading doctrine of the decision, viz., that actual and compensatory damages cannot be denied upon any ground of provocation

short of an actual justification of the assault, battery, and false imprisonment, which was not attempted in this action.

The testimony offered and received in mitigation of damages in this action, might well enough have been received, upon the question of punitive or exemplary damages, but it was not of a very satisfactory character upon that head even. The only portion of it which seems to afford any just apology for the flagrant misconduct of the defendants, was the stupid blunder of the provost-marshal in directing the plaintiff to be "detained." This had some fair tendency to vindicate the good faith of the defendants in arresting the plaintiff. But what can be said of their after-conduct in forcibly carrying the plaintiff three miles, and dragging him before a town meeting, and sentencing him to take an oath to support the Constitution of the United States? They might, with the same propriety, have sentenced him to be hanged, or burned to death. And if they had done so and carried the sentence into execution, and been indicted for murder, they should, so far as we can see, upon the principle of this decision, have been permitted to show the plaintiff's provoking bravado talk in mitigation of punishment—or possibly to reduce the verdict from murder to manslaughter.

It does not seem to us that such evidence should have been permitted to go to the jury, upon either the first or second point made in the plaintiff's re-

quest to charge, and not upon the third, except so far as it tended to show that the defendants acted under a misapprehension of the law, and in good faith; for punitive or exemplary damages are not given with any reference to the plaintiff's misconduct, within the limits of the law, but solely on account of the malice and wanton misconduct of the defendants, and to admonish them, and others in like case, not to repeat the misconduct. Is there anything in the plaintiff's folly and bravado, naturally calculated to induce the defendants to believe they had any legal right to deal with him in the manner they did? Was not then the charge of the court, and the result of the trial, directly calculated to encourage such abuses of right, such flagrant breaches of the law? Was not the conduct of the defendants malicious, wanton, and intentionally insulting and abusive? Can there be more than one opinion on these subjects? And was not the charge in the court below, the verdict of the jury, and the overruling of the exceptions, all calculated to encourage such conduct, and to discourage such actions? If so, can we fairly expect parties suffering like indignities to appeal to the tribunals for redress? And will not the result of such experiences, in courts of justice, sooner or later, end in a resort to force in all such cases? These are plain questions, but they are fundamental to the very existence of free states and private liberty, both of person and speech. I. F. R.

*Supreme Court of Pennsylvania.*GILLIS v. THE PENNSYLVANIA RAILROAD CO.<sup>1</sup>

The platform of a railroad company at a station is in no sense a public highway. There is no dedication to public use as such.

The platform is for the accommodation of passengers, and being unenclosed, persons have the privilege but have not the legal right of walking over it for other purposes.

The owner of property is not liable to a trespasser or to one who is on it by mere permission or sufferance, for negligence of himself or servants, or for that which would be a nuisance in a public street or common.

To persons who come on to a platform to meet or part with passengers, or who stand in such relation to the company as requires care, the company is bound to have the structure strong enough to bear all who could stand upon it.

The owner is bound to have the approach to his house sufficient for all visitors on business or otherwise, but if a crowd gathers on it to witness a passing parade, &c., and it breaks down, though not sufficient for its ordinary use, he is not liable to one of the crowd who might be injured.

ERROR to the Court of Common Pleas of *Cambria county*.

This was an action on the case for injuries sustained by the plaintiff by the breaking down of a platform of the defendants at the Johnstown station, Cambria county.

The declaration contained four counts. The first count charged that the defendants, being a corporation for conveying freight and passengers, and having the sole control of the passenger depots, platforms, &c., along the road for the mutual accommodation of themselves and the public, built a platform at the Johnstown station, bridging a chasm over the bed of an abandoned canal, on which large numbers of people were in the habit of congregating, "as a matter of general custom;" and it was the duty of the defendant to construct the platform so as to make it safe and keep it in good repair; that it had come to the knowledge of the defendants that the timbers of the platform were rotten, and "insufficient to support a large multitude of people," but that they notwithstanding insufficiently repaired it; that on the 14th of September 1866, "on the occasion of the visit of Andrew Johnson, President, &c., and suite, to Johnstown," the defendants furnished a special train, and made a special time-schedule for their accommodation, by which the train was required to stop a longer

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<sup>1</sup> We are indebted for this case to P. F. Smith, Esq., State Reporter.—ED.  
AM. L. R.



time than usual for passenger trains at Johnstown, &c., the company notifying the people at Johnstown and vicinity of the time of arrival and departure of the train at Johnstown, the stoppages being made by the direction of the defendants to give the people an opportunity of receiving Mr. Johnson and hearing him; that it had been publicly made known that wherever Mr. Johnson and his company had stopped large numbers of people congregated, and thereupon it became the duty of the defendants "to have the platform aforesaid made sufficiently strong to bear and uphold as many people as might congregate thereon on the occasion aforesaid;" that the defendants, knowing the insecure condition of the platform, did not use due diligence to have it made secure, but permitted and invited "a large multitude of people to congregate" thereon without notifying them or the plaintiff of its insecure condition; that the platform broke and precipitated the multitude with the plaintiff into the chasm, by which he was injured and wounded. The second count averred that the company carried Mr. Johnson and his party by agreement and for hire, and that the platform was part of the company's highway; the count was otherwise substantially as the first. The fourth count averred that the plaintiff went to the station on the occasion of Mr. Johnson's visit, at the defendants' special instance and request; that the train was not stopped at the usual place of stopping, but about two hundred yards beyond it, without giving notice to the people assembled, and to the plaintiff, and that the "plaintiff and the multitude were compelled to change their position to get a better view of the party," thereby causing them to congregate more numerously "on the insecure part of the platform;"—otherwise substantially as in the first count. The third count averred that the plaintiff was a passenger on the train, and got off the train on to the platform which broke, &c.

The facts necessary for an understanding of this case appear to be substantially the following:—

At or near the Johnstown station of the defendants, their railroad crosses the canal constructed by the state, at an angle of about 25 degrees—the canal being now abandoned; the passenger station and its platform are further west than the canal; eastwardly of this platform is a township bridge over the canal; that part of the canal between the railroad track and the township bridge is also planked over, making a continuous platform from the passen-

ger station to the track and the township bridge. On the 14th of September 1866, Mr. Johnson and his party were coming from Pittsburg, on their way from Chicago, on a special train of the defendants, which was provided without compensation. The train was running on a special time-schedule, and at the request of Mr. Johnson, or some of his party, it was arranged that it should stop about five minutes at each of several points along the road, Johnstown amongst others, that the people might have an opportunity of seeing and saluting them. It was generally known through the newspapers that the party would pass Johnstown on that day, but no previous notice of the time of the arrival of the train had been given by the company. A clerk in the telegraph office, however, mentioned the time in a printing-office in Johnstown, and before the arrival of the train handbills had been posted through the town announcing the precise time of arrival, and a very large crowd of people assembled at the station and on the platform. The train at first stopped at the usual place near the passenger station, but it being supposed that in that position the people would not have a good opportunity to see and hear Mr. Johnson and his party, who were on the hindmost car, the train was immediately moved a short distance further east. The crowd pressed onwards, collecting in very great numbers near the hindmost car, on that part of the platform over the canal, when the platform gave way and all on it, with the plank and broken timbers, were precipitated into the canal, a depth of about twenty feet. The plaintiff was amongst those who thus fell. Two or three were instantly killed; some died afterwards from the effects of the fall, and many were more or less seriously injured. The plaintiff was badly hurt. He brought this suit to recover damages for the injuries then received.

There was no evidence at all on the 3d count, the defendant not having been on any passenger train of the defendants that day.

The court below directed the jury to find a verdict for defendants.

*A. Kopelin* and *R. J. Johnston* (with whom was *D. McLaughlin*), for plaintiff in error.—The defendants were bound to use their property so as not to endanger others: *Broom's Leg. Max.* 257. Had the plaintiff been a trespasser it would not have

excused the defendant's negligence: 2 Redfield 193, 194; Mayne on Damages 4, 44; Pierce on Railways 285; *C. & C. Railway v. Terry*, 8 Ohio 570; *Birge v. Gardner*, 19 Conn. R. 507; *Bird v. Holbrook*, 4 Bing. 628; *Brown v. Lynn*, 7 Casey 510. There was negligence in keeping the platform in the condition in which it was, and the question whether there was concurring negligence was for the jury: *O. & M. R. R. v. Gullett*, 15 Ind. St. R. 487. Public policy requires that railroad companies should construct and keep their roads and appurtenances as well for the public interest as their own: Pierce on Railways 229; *Bank of Pittsburg v. Whitehead*, 10 Watts 402; *Kemmerer v. Edelman*, 11 Harris 143; *Bush v. Johnston*, Id. 209; *Holmes v. Watson*, 5 Casey 457; *Fisher v. Knox*, 1 Harris 625; *Pittsburg v. Grier*, 10 Id. 54; Id. 384; 1 Redfield on Railways 603-607; Pierce on Railways 244, 245, 487, 488. Railroad companies must keep their platforms in a safe condition for those who are on them either by their direct permission or through contract with others: *Sawyer v. R. & B. Railway*, 27 Vt. Rep. 377; *Marshall v. Y., N. & B. R. R.*, 11 C. B. 655; *Gerhard v. Bates*, 20 Eng. L. & Eq. 129; Broome on Com. Law 661, 679; *Davis v. Plank Road Co.*, 27 Vt. 602; *G. N. Railway v. Harrison*, 14 Eng. L. & Eq. 189; *P. & R. R. v. Derby*, 14 How. 480; *C. V. R. v. Hughes*, 1 Jones 141; *Carson v. Godley*, 2 Casey 111; *Grier v. Sampson*, 3 Id. 183; *Elliott v. Pray*, 10 Allen 378. No privity need be shown: Pierce on Railways 270; *Henderson v. Penna. R.*, 1 P. F. Smith 325; *Sweeney v. O. C. & N. R.*, 10 Allen 368; *Corby v. Hill*, 4 C. B. N. S. 556. The platform was dedicated to public use: *Banks v. S. Y. Railway*, 32 Law J. Q. B. 26. One undertaking an act by which the conduct of others may be properly governed, is bound to do it so that no one will suffer by his negligence: *Sweeney v. O. C. & N. R.*, *supra*; Story on Bailments 11; Parsons on Contracts, vol. 1, 372, 582-589; Smith on Contracts 185; 1 Smith's Leading Cases 244; *Coggs v. Bernard*, 2 Ld. Raym. 909; 1 Redfield on Railways 194, note 6, 604; *Thomas v. Winchester*, 2 Selden 397. When the gist of the action is negligence it is a question for the jury: 1 Redfield on Railways 544, 545; Pierce on Railways 282; 2 Hilliard on Torts 398, 409; *Beatty v. Gilmore*, 4 Harris 463; *Beach v. Parmeter*, 11 Id. 196; *L. & B. R. Co. v. Chenowith*, 2 P. F. Smith 382; *McGrew v. Stone*, 3 Id. 436. Opening depots and platforms is

prima facie a license to all to enter, and the entry is not a trespass: *Pierce on Railways* 251, &c.; *Com. v. Power*, 7 Met. 596; *Hall v. Power*, 12 Id. 482; 1 *Redfield on Railways* 94. The defendants should have anticipated the gathering and provided against accident: *Jones v. Bird*, 5 B. & A. 837; *Beers v. Housatonic R. Co.*, 19 Conn. 566, 569; *Park v. O'Brien*, 23 Id. 347; *O. & M. R. v. Gullett*, *supra*; *Burnham v. City of Boston*, 10 Allen 290; *Elliott v. Pray*, Id. 378; *Sweeny v. O. C. & N. R. Co.*, *supra*. A trespasser even would recover under such circumstances: *Mayne on Damages* 42, 43; *McCully v. Clarke*, 4 Wright 399. The case should have been submitted to the jury: 3 Bl. Com. 379; *Sedgwick on Statutory and Const. Law* 542.

*C. L. Pershing* and *J. Scott*, for defendants in error.—There was no contract relation which imposed any duty on the defendants: *R. R. Co. v. Skinner*, 7 Harris 298; *R. R. Co. v. Hummell*, 8 Wright 377; *R. R. Co. v. Norton*, 12 Harris 465; *Kelly v. Penna. R. R. Co.*, 7 Casey 372; *Knight v. Abert*, 6 Barr 472; *Barker v. Midland R.*, 36 Eng. L. & Eq. 258; *Pickford v. Grand Junction R.*, 8 M. & W. 372; *Lucas v. T. & N. B. R.*, 6 Gray 66; *Brand v. T. & S. R.*, 8 Barb. 378; *Lygo v. Newbold*, 9 Exch. Rep. 302; *Binks v. S. Y. R. Co.*, 32 Law Jour. N. S. 26; *Winterbottom v. Wright*, 10 M. & W. 109; *Com. v. Power*, 7 Metc. 602; *Hall v. Power*, 12 Id. 485; *Heil v. Glanding*, 6 Wright 493; *Brooks v. Buffalo R. R.*, 25 Barb. 600. The defendants are not within the maxim *sic utere tuo*, &c.: *Sweeny v. O. C. & N. R.*, *supra*; *Southcote v. Stanley*, 1 H. & N. 247; *Howland v. Vincent*, 10 Metc. 371, 1 Rol. Ab. 88; *Adams v. Reeves*, 11 Barb. 398. The defendants were not bound to keep the platform more than sufficient for their ordinary business; *Withers v. N. K. R.*, 3 H. & N. 971; *Blyth v. Birmingham W. Works*, 36 Eng. L. & Eq. 506, *P.*, *Ft. W. & C. R.*, 3 P. F. Smith 512. The court properly ruled the case as a question of law: 1 *Redfield on Railways* 546; *Catawissa R. R. v. Armstrong*, 2 P. F. Smith 282.

The opinion of the court was delivered by

SHARSWOOD, J.—The platform of a railroad company at its station or stopping-place is in no sense a public highway. There is no dedication to public use as such. It is a structure erected expressly for the accommodation of passengers arriving and

departing in the train. Being unenclosed, persons are allowed the privilege of walking over it for other purposes, but they have no legal right to do so. The servants of the company, after requesting them to leave, can remove them by whatever force may be necessary: *Barker v. The Midland Railway Co.*, 18 C. B. 46; *Corinth v. Power*, 7 Metc. 596; *Hall v. Power*, 12 Id. 485; *Harris v. Stevens*, 31 Verm. 79. Still, even a trespasser on the land of another can maintain an action for a wanton or intentional injury inflicted on him by the owner. It will appear on an examination of the interesting and elaborate discussion in the English courts of the question whether an action could be supported by such a trespasser for personal harm occasioned by a spring-gun, man-trap or dog-spike, set on the grounds of the defendant, in which it was determined that where there was no proper warning given, such an action well lies, that it was rested mainly on the ground that a man cannot lawfully do indirectly that which it is unlawful for him to do directly. He cannot shoot or maim or set a ferocious dog upon a mere trespasser. He shall not then place a concealed machine where it will be likely to do the same thing, or let such a dog loose in his grounds without warning: *Deane v. Clayton*, 7 Taunt. 489; *Ilott v. Wilkes*, 3 B. & Ald. 304; *Bird v. Holbrook*, 4 Bing. 628. It is, however, equally well settled that the owner of property is not liable to a trespasser, or to one who is on it by mere permission or sufferance, for negligence of himself or servants, or for that which would be a nuisance if it were in a public street or common, where all persons had a legal right to be without question as to their purpose or business.

It will be unnecessary to pass in review all the cases which in England and this country establish the principle, or to examine and reconcile if possible those which seem to conflict with it. It is put in many of them on the grounds of contributory negligence in the trespasser. It is plain, however, that the two principles are entirely independent of each other, though they do in fact often concur, and thereby have made confusion. In *Hounsell v. Smith*, 7 C. B. N. S. 731, the plaintiff fell down a quarry, which was left open and unguarded on the unenclosed waste lands of the defendant, over which, in passing from one public highway to another, the public were freely allowed to walk: it was held that the defendant, the owner, was under no legal obligation to fence the excavation, unless it was made so near to a public road or way as

to constitute a public nuisance, or, in other words, to render the lawful use of such public road dangerous. "No right is alleged," says Mr. Justice WILLIAMS, "it is merely stated that the owners allowed all persons who chose to do so, for recreation or for business, to go upon the waste without complaint; that they were not churlish enough to interfere with any person who went there. He must take the permission with its concomitant conditions, and it may be, perils." This decision was cited with approbation and affirmed in *Binks v. The South Yorkshire Railway and River Dun Co.*, 3 Best & Sm. 244. But a much stronger case, and more directly in point, is *Lygo v. Newbold*, 9 Exch. 302. It was there decided that even an express permission given to the plaintiff by the defendant's servant to occupy a place to which she had no right would not cast responsibility on the master. The plaintiff in that case, without the defendant's authority, but by the permission of his servant, rode in a cart along with some goods which the defendant had contracted to carry for her. The cart, being insufficient, broke down, and the plaintiff was injured. It was held that she could not recover.

Thus the three superior courts of England, the Common Pleas, Queen's Bench and Exchequer, concur in this doctrine.

But our own case of *Knight v. Abert*, 6 Barr 472, is on all fours with them. It was there decided that, though no action lies in Pennsylvania for trespass by cattle pasturing on unenclosed woodland, yet, that not being a matter of right, the owner of land is not liable for an injury sustained by such cattle falling into a hole dug by him within the bounds of his land and left unenclosed. "He who suffers his cattle to go at large," says C. J. GIBSON, "takes upon himself the risks incident to it." So must a person, using by permission or sufferance the private property of another, take upon himself the risks incident to it. To the same effect, if closely examined, is *The Philadelphia and Reading Railroad Company v. Hummel*, 8 Wright 378. The plaintiff below in that case was a boy of tender years, to whom no contributory negligence could be imputed. He was on the track of a railroad, not at a crossing. It was held that the railroad company, as to persons so on the track, were not bound to give any warning at starting. "Blowing the whistle of the locomotive, or making any other signal," said Mr. Justice STRONG, "was not a duty owed to the persons in the neighborhood, and consequently

the fact that the whistle was not blown, nor signal made, was no evidence of negligence." And, again: "There is as perfect a duty to guard against an accidental injury to a night intruder into one's bed-chamber as there is to look out for trespassers upon a railroad where the public has no right to be." No reference is made in the opinion to *Lynch v. Nurdin*, 1 Q. B. 29, a decision much controverted, but one which has stood its ground. But in that case the careless act of the defendant, in leaving a horse and cart standing in a public street without anybody to watch it, amounted to a nuisance, and it is to be distinguished on that ground. Had it been left standing on an open, unenclosed lot, the ruling in all probability would have been different. Yet a doubt has been more than once expressed, whether when a child receives an injury from indulging in what is called "the natural instinct of a child," by getting up behind a gentleman's carriage whilst it is in motion, or standing in charge of a coachman, though without a servant on the footboard, the principle of *Lynch v. Nurdin* would apply: *Wilson v. Brett*, 11 M. & W. 118; *Lygo v. Newbold*, 9 Exch. 302. It would matter not, so far as his master was concerned, whether the coachman allowed it or not.

The application of this principle to the determination of the case in hand is not difficult. The plaintiff may not have been technically a trespasser. The platform was open; there was a general license to pass over it. But he was where he had no legal right to be. His presence there was in no way connected with the purposes for which the platform was constructed. Had it been the hour for the arrival or departure of a train, and he had gone there to welcome a coming or speed a parting guest, it might very well be contended that he was there by the authority of defendants, as much as if he was actually a passenger, and it would then matter not how unusual might have been the crowd, the defendants would have been responsible. As to all such persons to whom they stood in such a relation as required care on their part, they were bound to have the structure strong enough to bear all who could stand on it. As to all others they were liable only for wanton or intentional injury. The plaintiff was on the spot merely to enjoy himself, to gratify his curiosity or to give vent to his patriotic feelings. The defendants had nothing to do with that. They were conveying the President of the United States and his party on a special excursion train. They

must have stopping-places. They were certainly under no obligation to keep them secret. On the occasion in question it seems that they meant to do so in order to prevent detention and confusion. As we have seen, they cannot be made liable by the unauthorized act of one of their employees, through whom it leaked out what the hour was the train was expected to arrive at Johnstown, nor for that of another in backing up the train so as to give the people who had assembled an opportunity of seeing and hearing the President. I am bound to have the approach to my house sufficient for all visitors on business or otherwise; but if a crowd gathers upon it to witness a passing parade and it breaks down, though it may be shown not to have been sufficient even for its ordinary use, I am not liable to one of the crowd,—I owe no duty to him. If a traveller by foot, on the open track of a railroad, crosses a bridge, which ought to be, but is not in its ordinary use, strong enough to bear a locomotive and train of cars, and a rotten board breaks down under him, the company are not liable to him, for they owe him no duty. However much to be lamented was the sad occurrence which occasioned this suit, and however much sympathy may be felt for those who were injured, and the families of those who lost their lives, we are of the opinion that the circumstances of the case were not such as to cast any pecuniary responsibility on the railroad company, and that the learned judge below was therefore right in directing the jury to find a verdict for the defendants.

#### Judgment affirmed.

The foregoing case is one which excited great interest, not only in the locality, but throughout the profession in the state, having been regarded as a test case upon which would depend the fate of more than two hundred actions of the same kind, brought against the railroad company by parties injured by the unfortunate accident at Johnstown, in September 1866.

The full list of authorities cited, renders it unnecessary for us to do more than add a brief note of two English cases reported since the argument.

In *Gautret, Administrator, v. Egerton*, Law Rep. 2 C. P. 371, the declaration  
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stated that the defendants were possessed of land with a canal and cuttings intersecting the same, and of bridges across the canal and cuttings communicating with and leading to certain docks of the defendants, which land and bridges were used with the consent and permission of the defendants, by persons proceeding to and coming from the docks; that they wrongfully and improperly kept and maintained the land, canal, cuttings, and bridges, and suffered them to be in so improper a state and condition as to render them unsafe for persons lawfully passing along and over the said land and bridges towards the said docks; and



that one G. lawfully passing over and using the bridges, through the wrongful, negligent, and improper conduct of the defendants, fell into one of the cuttings and was drowned.

Defendants demurred, on the ground that the declaration stated no actionable breach of duty by defendants, and the demurrer was sustained, WILLES, J., saying: "The consequences of these accidents are sought to be visited upon these defendants, because they have allowed persons to go over their land, not alleging it to have been upon the business or for the benefit of the defendants, or as the servants or agents of the defendants; nor alleging that the defendants have been guilty of any wrongful act, such as digging a trench on the land, or misrepresenting its condition, or anything equivalent to laying a trap for the unwary passengers; but simply because they permitted these persons to use a way with the condition of which, for anything that appears, those who suffered the injury were perfectly well acquainted. That is the whole sum and substance of these declarations. \* \* \* Every man is bound not wilfully to deceive others, or do any act that may place them in danger; \* \* \* but I cannot conceive that he could incur any responsibility merely by reason of his allowing the way to be out of repair."

The same question was considered in the very recent case (May 1869) of *Holmes v. N. E. Railway Co.*, Law Rep. 4 Exch. 254. At the defendants' station at C. it was the habit to unload coal-wagons by shunting them and tipping the coal into cells; it was also the practice for the consignees of the coal, or their servants, to assist in the unloading, and for that purpose to go along a flagged path by the side of the wagons. The plaintiff was consignee of a coal-wagon, which could not be unloaded in the usual way, on account of all the cells

being occupied. With the permission of the station-master, he went to his wagon, which was shunted in the usual place, took some coal from the top of the wagon, and descended on to the flagged path. The flag he stepped on gave way, and he fell into one of the cells and was injured. It was held that, although not getting his coal in the usual mode, the plaintiff was not a mere licensee, but was engaged with the consent and invitation of the defendants, in a transaction of common interest to both parties, and was, therefore, entitled to require that the defendants' premises should be in a reasonably secure condition. BRAMWELL, B., said: "I have had considerable doubts, and am not wholly free from them. If the plaintiff had gone where he did by the mere license of the defendants, he would have gone there subject to all the risks attending his going; as for instance, *if he went there to see something that was going on in a neighboring field*. If, therefore, this had been the first occasion of such an errand, he would have had no claim. But many people had been in the habit of going to unload their wagons by tipping, and it became a practice, so that consignees might consider it as part of their contract to go and assist in that operation. I have had great doubt whether all such persons were not mere licensees, and I have that doubt still; for the defendants might at any time say to them, "you have no right to go there," and prevent them from doing so. Still, I think they come within the description of persons invited to go there, in the same sense in which the public are invited to walk into a shop. They are persons who are, in effect, told that they may safely do that which it is *for the convenience of both parties to have done*."

See also *Robbins v. Jones*, 15 C. B. (109 E. C. L. R.) 221. J. T. M.

*Supreme Court of the United States.*

## THORINGTON v. SMITH &amp; HARTLEY.

The Confederate States, though not a *de facto* government in the highest sense of that term, were a government of paramount force having actual supremacy within certain territorial limits, and therefore a *de facto* government in such a sense as made civil obedience to their authority the duty of the inhabitants of the territory under their control.

Confederate notes as contracts in themselves are nullities, but they must be regarded as a currency imposed on the citizens of the insurrectionary states by irresistible force, and therefore contracts for payment in such currency, made between citizens of the Confederacy in the ordinary course of civil business and without direct intent to assist the insurrection are valid, and will be enforced by the courts of the United States.

A contract to pay dollars made between citizens of any state maintaining its constitutional relations with the National Government, is a contract to pay lawful money of the United States, and cannot be modified or explained by parol evidence.

But the word dollars if used in a contract between citizens of a foreign state could be shown by parol evidence to mean dollars of a different kind from United States dollars, and the same rule must apply to a contract between citizens of the Confederate States.

A party entitled to be paid in Confederate notes, can only recover their actual value at the time and place of the contract in lawful money of the United States.

APPEAL from the Circuit Court of the United States, for the Middle District of Alabama.

This was a bill in equity for the enforcement of a vendor's lien.

Smith & Hartley purchased from Thorington a piece of land, and executed to him their promissory note for part of the purchase-money.

But it was insisted by way of defence that the negotiation for the purchase of the land took place, and that the note in controversy, payable one day after date, was made at Montgomery, in the state of Alabama, where all the parties resided in November 1864, at which time the authority of the United States was excluded from that portion of the state, and the only currency in use consisted of Confederate treasury notes, issued and put in circulation by the persons exercising the ruling powers of the states in rebellion, known as the Confederate government.

It was also insisted that the land purchased was worth no more than \$3000 in lawful money; that the contract price was \$45,000; that this price, by the agreement of the parties, was to be paid in Confederate notes; that \$35,000 were actually paid in these

notes, and that the note given for the remaining \$10,000 was to be discharged in the same manner, and it was claimed on this state of facts that the vendor was not entitled to relief in a court of the United States.

This view was sustained in the court below, and the bill was dismissed.

The opinion of the court was delivered by

CHASE, C. J.—The questions before us upon appeal are these:—

1. Can a contract for the payment of Confederate notes, made during the late rebellion, between parties residing within the so-called Confederate States, be enforced at all in the courts of the United States?

2. Can evidence be received to prove that a promise expressed to be for the payment of dollars was in fact for the payment of any other than lawful dollars of the United States?

3. Does the evidence on the record establish the fact that the note for \$10,000 was to be paid, by agreement of the parties, in Confederate notes?

The first question is by no means free from difficulty.

It cannot be questioned that the Confederate notes were issued in furtherance of an unlawful attempt to overthrow the government of the United States by insurrectionary force. Nor is it a doubtful principle of law that no contracts made in aid of such an attempt can be enforced through the courts of the country whose government is thus assailed.

But was the contract of the parties to this suit a contract of that character? Can it be fairly described as a contract in aid of the rebellion?

In examining this question the state of that part of the country in which it was made must be considered.

It is familiar history that early in 1861 the authorities of seven states, supported, as was alleged, by popular majorities, combined for the overthrow of the National Union, and for the establishment within its boundaries of a separate and independent confederation. A governmental organization representing these states was established at Montgomery, in Alabama, first under a provisional constitution, and afterwards under a constitution intended to be permanent.

In the course of a few months four other states acceded to this

confederation, and the seat of the central authority was transferred to Richmond, in Virginia.

It was by the central authority thus organized, and under its direction, that the civil war was carried on upon a vast scale against the government of the United States for more than four years. Its power was recognised as supreme in nearly the whole of the territory of the states confederated. It was the actual government of all the insurgent states, except those portions of them protected from its control by the presence of the armed forces of the national government.

What was the precise character of this government in contemplation of law? It is difficult to define it with exactness. Any definition that may be given may not improbably be found to require limitation and qualification. But the general principles of law relating to *de facto* governments will, we think, conduct us to a conclusion sufficiently accurate.

There are several degrees of what is called *de facto* government. Such a government, in its highest degree, assumes a character very closely resembling that of a lawful government. This is when the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their place, and so becomes the actual government of a country.

The distinguishing characteristic of such a government is that the adherents to it in war against the government *de jure* do not incur the penalties of treason, and, under certain limitations, obligations assumed by it in behalf of the country, or otherwise, will in general be respected by the government *de jure* when restored.

Examples of this description of government *de facto* are found in English history. The statute 11 Henry VII., c. 1 (Brit. Stat. at Large), releases from penalties for treason all persons who, in defence of the king for the time being, wage war against those who endeavor to subvert his authority by force of arms, though warranted in so doing by the lawful monarch: 4 Bl. Com. 77.

But this is where the usurper obtains actual possession of the royal authority of the kingdom; not where he has succeeded only in establishing his power over particular localities. Being in such possession, allegiance is due to him as king *de facto*.

Another example may be found in the government of England under the Commonwealth, first by Parliament, and afterwards by

Cromwell as Protector. It was not, in the contemplation of law, a government *de jure*, but it was a government *de facto* in the most absolute sense. It made laws, treaties, and conquests which remained the laws, treaties, and conquests of England after the restoration. The better opinion is, that acts done in obedience to this government could not be justly regarded as treasonable, though in hostility to the king *de jure*. Such acts were protected from criminal prosecution by the spirit, if not the letter, of the statute of Henry VII. It was held otherwise by the judges by whom Sir Henry Vane was tried for treason (6 State Trials 119), in the year following the restoration. But such a judgment, in such a time, has little authority.

It is very certain that the Confederate government was never acknowledged by the United States as a *de facto* government in this sense. Nor was it acknowledged as such by other powers. No treaties were made by it. No obligations of a national character were created by it binding, after its dissolution, on the states which it represented, or on the national government. From a very early period of the civil war to its close it was regarded as simply the military representative of the insurrection against the authority of the United States.

But there is another description of government called also by publicists a government *de facto*, but which might, perhaps, be more aptly denominated a government of paramount force. Its distinguishing characteristics are: First, that its existence is maintained by active military power within the territories and against the rightful authority of an established and lawful government; and second, that while it exists, it must necessarily be obeyed in civil matters by private citizens, who, by acts of obedience rendered in submission to such force, do not become responsible as wrongdoers for these acts, though not warranted by the laws of the rightful government. Actual governments of this sort are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority, but they may be administered also by civil authority, supported more or less directly by military force.

One example of this sort of government is found in the case of Castine, in Maine, reduced to British possession during the war of 1812. From the 1st of September 1814 to the ratification of the treaty of peace in 1815, according to the judgment of the

court in *United States v. Rice*, 4 Wheat. 253, "the British government exercised all civil and military authority over the place." \* \* "The authority of the United States over the territory was suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conqueror. By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognise and impose."

It is not to be inferred from this that the obligations of the people of Castine, as citizens of the United States, were abrogated. They were suspended merely by the presence, and only during the presence of the paramount force.

A like example is found in the case of Tampico, occupied during the war with Mexico by the troops of the United States. It was determined by this court in *Fleming v. Page*, 9 How. 614, that although Tampico did not become a part of the United States in consequence of that occupation, still, having come together with the whole state of Tamaulipas, of which it was part, into the exclusive possession of the national forces, it must be regarded and respected by other nations as the territory of the United States.

There were cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was part.

The central government established for the insurgent states differed from the temporary governments at Castine and Tampico, in the circumstance that its authority did not originate lawful acts of regular war; but it was not on that account less actual or less supreme, and we think that it must be classed among the governments of which these are examples. It is to be observed that the rights and obligations of a belligerent were conceded to it in its military character, very soon after the war began, from motives of humanity and expediency, by the United States. The whole territory controlled by it was thereafter held to be enemy's territory, and the inhabitants of that territory were held in most respects for enemies. To the extent then of actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent government cannot be questioned.

That supremacy would not justify acts of hostility to the

United States. How far it should excuse them must be left to the lawful government upon the re-establishment of its authority. But it made civil obedience to its authority not only a necessity but a duty. Without such obedience civil order was impossible.

It was by this government exercising its power through an immense territory that the Confederate notes were issued early in the war; and these notes in a short time became almost exclusively the currency of the insurgent states.

As contracts in themselves, in the contingency of successful revolution, these notes were nullities; for except in that event there could be no payer. They bore indeed this character upon their face, for they were made payable only "after the ratification of a treaty of peace between the Confederate States and the United States of America."

While the war lasted, however, they had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people. They must be regarded, therefore, as a currency imposed on the community by irresistible force.

It seems to follow as a necessary consequence from the actual supremacy of the insurgent government, as a belligerent, within the territory where it circulated, and the necessity of civil obedience on the part of all who remained in it, that this currency must be regarded in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States.

Contracts stipulating for payments in that currency cannot be regarded as made in aid of the foreign invasion in the one case, or of the domestic insurrection in the other. They have no necessary relation to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further the invasion or insurrection.

We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation.

The first question, therefore, must receive an affirmative answer.

The second question, whether evidence can be received to prove that a promise made in one of the insurgent states, and expressed to be for the payment of dollars, without qualifying words, was, in fact, made for the payment of any other than lawful dollars of the United States, is next to be considered.

It is quite clear that a contract to pay dollars, made between citizens of any state of the Union maintaining its constitutional relations with the national government, is a contract to pay lawful money of the United States, and cannot be modified or explained by parol evidence.

But it is equally clear if in any other country coins or notes denominated dollars should be authorized of different value from the coins or notes which are current here under that name, that in a suit upon a contract to pay dollars, made in that country, evidence would be admitted to prove what kind of dollars were intended, and if it should turn out that foreign dollars were meant, to prove their equivalent value in lawful money of the United States.

Such evidence does not modify or alter the contract. It simply explains an ambiguity which, under the general rules of evidence, may be removed by parol evidence.

We have already seen that the people of the insurgent states, under the Confederate government, were in legal contemplation substantially in the same condition as inhabitants of districts of a country occupied and controlled by an invading belligerent. The rules which would apply in the former case would apply in the latter; and, as in the former case, the people must be regarded as subjects of a foreign power, and contracts among them be interpreted and enforced with reference to the laws imposed by the conqueror, so in the latter case the inhabitants must be regarded as under the authority of the insurgent belligerent power actually established as the government of the country; and contracts made with them must be interpreted and inferred with reference to the condition of things created by the acts of the governing power.

It is said, indeed, that under the insurgent government the word "dollar" had the same meaning as under the government of the United States; that the Confederate notes were never made a legal tender; and, therefore, that no evidence can be received to show any other meaning of the word when used in a contract.



But it must be remembered that the whole condition of things in the insurgent states was matter of fact rather than matter of law; and, as matter of fact, these notes, payable at a future and contingent day, which has not arrived and can never arrive, were forced into circulation as dollars, if not directly by the legislation, yet indirectly and quite as effectually by the acts of the insurgent government. Considered in themselves, and in the light of subsequent events, these notes had no real value, but they were made current as dollars by irresistible force. They were the only measure of value which the people had, and their use was almost a matter of absolute necessity. And this gave them a sort of value, insignificant and precarious enough, it is true, but always having a sufficiently definite relation to gold and silver, the universal measures of value, so that it was always easy to ascertain how much gold and silver was the real equivalent of a sum expressed in this currency.

In the light of these facts it seems hardly less than absurd to say that these dollars must be regarded as identical in kind and value with the dollars which constitute the money of the United States. We cannot shut our eyes to the fact that they were essentially different in both respects, and it seems to us that no rule of evidence, properly understood, requires us to refuse, under the circumstances, to admit proof of the sense in which the word dollar was actually used in the contract before us.

Our answer to the second question is, therefore, also in the affirmative. We are clearly of opinion that such evidence must be received in respect to such contracts in order that justice may be done between the parties, and that the party entitled to be paid in these Confederate dollars can only receive their actual value at the time and place of the contract in lawful money of the United States.

We do not think it necessary to go into a detailed examination of the evidence in the record in order to vindicate our answer to the third question. It is enough to say that it has left no doubt in our minds that the note for \$10,000, to enforce payment of which suit was brought in the Circuit Court, was to be paid, by agreement of the parties, in Confederate notes.

It follows that the judgment of the Circuit Court must be reversed, and the cause remanded for a new trial, in conformity with this opinion.

*United States District Court—Southern District of New York.*

## IN RE GARRET S. BELLIS AND JAMES MILLIGAN.

A witness who was a lawyer being under examination was questioned touching a certain conveyance made to him by the bankrupt and wife and a subsequent conveyance by him to the wife, and refused to testify thereon as matter within the privilege of confidential communications between attorney and client.

*Held*, on the facts stated the questions were proper and must be answered, and are not within such privilege.

ON April 8th 1868, James Milligan and wife executed a deed conveying certain property to ————.

On April 10th 1868, the said ———— conveyed the same property to Elizabeth R. Milligan, wife of said James Milligan.

——— is an attorney; being called as a witness in the matter of Bellis and Milligan, bankrupts, he refused to testify concerning the said transfers on the ground that they were made in the course of his professional business, and are therefore within the privilege of confidential communications between him and his clients.

The following questions were asked, all of which the witness refused to answer:—

Q. 1. State whether James Milligan, one of the bankrupts, conveyed to you by deed, on or about the 8th day of April 1868, certain real estate situated in the city of Brooklyn.

Q. 2. State the consideration, if any, given by you to him therefor.

Q. 3. State whether you simultaneously, on or about the same date, by deed, conveyed to Elizabeth R. Milligan, wife of said James Milligan, the same premises so conveyed to you by James Milligan on or about the 8th day of April 1868.

Q. 4. State the consideration, if any, given to you by Elizabeth R. Milligan therefor.

Q. 5. State whether at that time any suit or action at law was pending in relation to the said real estate between the said James Milligan and wife and any person, in which you were attorney or counsel of Mr. and Mrs. Milligan, or whether there has, since the 8th day of April 1868, been such an action pending in relation to said real estate in which you were attorney or counsel.

JOHN FITCH, Register.—In this case the witness claims that the rule which protects professional communications of clients to their attorney or counsel, extends to all business communications as well as those appertaining to suits in law or equity or other judicial proceedings. Upon examining the authorities, I find that in the early history of litigation parties prosecuted or defended their suits in person. In the progress of time, as litigation increased, and judicial proceedings became settled and established, men skilled and learned in the law and practice of the courts were employed to conduct the prosecution and defence of causes. Parties were not then compelled to testify, and hesitated to communicate the facts in relation to their causes to others; to obviate that difficulty the courts adopted the rule in relation to professional communications of clients to their attorneys, exempting the same from disclosure, &c. Among the early cases upon this subject is that of *Annesly v. The Earl of Anglesea*, before the Barons of the Irish Exchequer: 17 Howell's State Trials 1139. The case was most extensively and ably argued, and very elaborately considered by the court, and the conclusion arrived at as to the true origin of the rule in question may be best stated in the language of Mr. Baron MOUNTENAY, who says, at page 1240, "Mr. Recorder has very properly mentioned the foundation upon which it hath been held, and it is certainly undoubted law that attorneys ought to keep inviolably the secrets of their clients, viz.: That an increase of legal business and the inability of parties to transact that business themselves, made it necessary for them to employ other persons who might transact that business for them. That this necessity introduced with it the necessity of what the law hath very justly established, an inviolable secrecy to be observed by attorneys, in order to render it safe for clients to communicate to their attorneys all proper instructions for the carrying on of these causes which they found themselves under the necessity of intrusting to their care."

In the case of *Dixon v. Parmelee*, 2 Vt. Rep. 185, PADDOCK, J., says: "It also became necessary for courts to adopt a rule by way of pledge to suitors that their secret and confidential communications to their attorneys should not be drawn from them with or without the consent of such attorney." Among the earliest cases to be found on this subject are *Berd v. Lovelace*, Cary's Rep. 88; *Austin v. Vesey*, Id. 89; *Kilway v. Kilway*, Id.

126; *Dennis v. Codrington*, Id. 143. Solicitors and counsel were excused from testifying on the ground that they were solicitors or counsel in the cause. In *Waldron v. Ward*, Styles' Rep. 449, a witness was offered in evidence to be examined as to some matter "whereof he had been made privy as of counsel in the cause." The courts would not permit the examination. In *Sparke v. Middleton*, Keble 505, counsel for the defendant was excused from testifying on the ground "that he should only reveal such things as he either knew before he was of counsel, or that came to his knowledge since by other persons." In *Cuts v. Pickering*, 1 Vent. 197, a witness was called to testify concerning an erasure in a will supposed to have been made by Pickering. The witness, after the erasure, was retained as his solicitor in the cause. In *Valiant v. Dodermead*, 2 Atk. 524, witness was called to prove certain interrogatories. Objections, that his knowledge of the matters was obtained as a clerk in court. Evidence received. Lord HARDWICKE says: "That the matters inquired after by the plaintiff's interrogatories were antecedent transactions to the commencement of the suit." In the last-cited cases the communications to the respective parties were during the pendency of an action in which they were either attorney, solicitor, or counsel. The same rule is held by the courts in this state, and seems to decide the question in this case. In 17 Johns. 335, the court says: "The privilege, in its most comprehensive sense, is not broad enough to cover collateral facts, the answer to which does not betray any confidential communication between attorney and client."

An attorney or counsel may be called on to testify to a collateral fact within his knowledge, or to a fact which he might know without being intrusted with it by his client: *Johnson v. Daverne*, 19 Johns. 184; *Cobden v. Kendrick*, 4 Term 431.

Communications made to an attorney at law with a view to obtain his assistance in the commission of a felony are not privileged: *The Rochester City Bank v. Suydam*, 5 How. 254. To be brought within its protection if they do not appertain to any suit or legal proceeding commenced or contemplated, should be made under cover of an employment *strictly professional*, and should be such as the business to be done requires to be made. They should also be of a confidential nature, and so considered at the time, and should be shown to have been made with direct

reference to the professional business upon which they may be supposed to bear: 17 Howell's State Trials 1139; 1 Greenlf. Ev. 244; 1 Phil. Ev. 145; 1 Starkie.

In section 26 of the Bankrupt Act 1867, it is provided that the court may at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination on oath upon all matters relating to the disposal or condition of his property; the bankrupt is therefore liable to be called (and in this case has been called) and examined upon these very transactions. He cannot extend an immunity to his attorney which he does not possess himself. The privilege is for the benefit of the client, not the attorney. The authorities upon this point which I have cited show that originally no communications were protected as confidential professional communications, except that which related to the management of some suit or judicial proceeding actually pending or about to be commenced in some court. Few cases have gone beyond that. In the case of *Wilson v. Troup*, 7 Johns. C. Rep. 25, and s. c. 2 Cowen Rep. 195, Haight, an attorney, was retained to conduct the foreclosure of a mortgage by advertisement under the act concerning the foreclosure of mortgages by advertisement. It was claimed that Troup employed Haight because Haight was a lawyer, and the Court of Errors evidently considered the relation of the party in the statutory foreclosure case, namely, Troup and Haight, as that of attorney and client, and therefore the evidence of Haight was not admissible as against Troup, his client. This decision is unquestionably correct and founded upon the principle that a statutory foreclosure of a mortgage by advertisement is in the nature of a judicial proceeding. And in *Jackson v. Dominick*, 14 Johns. Rep. 443, the court says, "that a foreclosure under the statute is substantially equivalent to a foreclosure in equity, same in effect:" 5 How. Pr. Rep. 261.

In this case there was no action pending. The witness drew a deed conveying certain real estate from James Milligan to himself. He then conveyed the said real estate to Mrs. Milligan, the wife of said James Milligan. There was no action then pending in regard to said real estate, and the question before the court in relation to said real estate now is, whether the legal title of the real estate so conveyed vests in Mrs. Milligan as against the assignee in bankruptcy. Now, the witness is simply called upon

to state the fact of the receiving and the conveying of the real estate, the consideration, if any, he gave or received therefor, and what was said and done on the occasion. His testimony, if given, cannot do injustice to any one. The same facts have been proven by James Milligan in these proceedings. The deeds can be given in evidence, and although Mrs. Milligan cannot be compelled to testify to these facts in bankruptcy, still she can be made to do so by a bill in equity on the part of the assignee against herself, her husband and the witness to set aside said conveyance as fraudulent, &c., &c., as against the assignee in bankruptcy: 30 Barb. 506. The Court of Appeals in *Whiting v. Barney*, 30 N. Y. 330, SELDEN, J., holds that the rule which protects professional communications of clients to their attorneys or counsel from disclosure should only extend to such communications as have relation to ~~some~~ suit or other judicial proceeding either existing or contemplated.

The testimony in this case is claimed only for the bankrupt, which brings it within the cases of *Griffith v. Davis*, 5 Barn. & Ald. 502; *Shore v. Bedford*, 5 Man. & G. 271; *Weeks v. Argent*, 16 M. & W. 816. In 30 N. Y. 342, INGRAMAM, J., says, "If he was only the counsel of Barney, then the decisions settle that the disclosures being made in the presence of a third party, they are not privileged." I think that for the purposes of this case Mrs. Milligan, the wife of the petitioner, who received the conveyance from the witness as property to her sole and separate use, must be considered as a third person. I have given the authorities as they were previous to the legislative enactments in this state in relation to the examination of parties as witnesses, which enactments are as follows: Any party in any civil suit or proceeding, either in law or equity, had before any court or officers, may require any adverse party, whether complainant, plaintiff, petitioner or defendant, or any one of said adverse party, any and every person who is beneficially interested in said suit or proceedings, though not nominally as parties, to give testimony under oath in such suit or proceeding; and such adverse party may be examined orally, or under a commission, in the same manner as persons not parties to such suit or proceeding, and who are competent witnesses therein; and such party may be subpoenaed and his attendance as a witness compelled, or he may be examined by a commission, or conditionally, or his testimony perpetuated in the same manner as any competent witness.

"The court or officer before whom such suit or proceeding may be had, shall have power to dismiss the bill, petition, or proceeding of any party, or any part thereof, with costs, or nonsuit any party, or strike out or disregard any defence or any part thereof of any party who shall refuse to testify.

"Any party in any suit or proceeding as aforesaid shall be required, to entitle him to examine the adverse party as a witness in any suit or proceeding, to give testimony therein in the same manner as the attendance of witnesses in ordinary cases."

The Act of Congress, July 16th 1862, provides:—

"That the laws of the state in which the court shall be held, shall be the rules \* \* \* as to the competency of witnesses in the court of the United States."

In this case the rights and privileges of the attorney and his duty to his clients, are entirely separate and distinguished from his rights and duties as purchaser and vendor. The transaction in relation to the purchase and sale of the real estate was not a part and parcel of, or in and about any lawsuit in which he was counsel for either the petitioner or his wife. It therefore stands as a transaction of purchase and sale of real estate, the witness purchasing the real estate of Mr. Milligan, and selling the same to Mrs. Milligan, his wife, two days thereafter.

It is claimed by the assignee in bankruptcy that this was a mere fraud and cover, that it was a mere formal transfer of the real estate from the husband to the wife, using the name of the witness as a mere go-between, so that the conveyance might technically conform to the letter of the Act of 1849 regulating the property-rights of married women, and at the same time defeat the spirit and intent of the law; that the wife acquired no legal or vested rights therein by said conveyance other than her contingent right of dower to which she was previously entitled.

I find that previous to the Act of 1847, and the acts amendatory thereunto, an attorney occupied the same position as his client in relation to giving testimony, and was privileged as to all matters which his client could not be compelled to disclose. But now, whenever and wherever the client can be compelled as a witness to testify to any fact, then the attorney must also testify; the statutes of this state having abrogated the former common-law rule to that effect.

That the witness in this case is not privileged, as the mere act of receiving and conveying the title to real estate about which there has not been any action pending, does not bring him within the former common-law rule, as to privileged communications to attorneys and counsel, and since the enactment of 1847 no such privilege exists which can be claimed for the witness in this case.

That the questions are pertinent to the issue and proper, and the witness must answer.

BLATCHFORD, J.—On the facts stated by the Register, the five questions set forth were proper, and must be answered by the witness, and are not within the privilege of confidential communications between attorney and client.

## ABSTRACTS OF RECENT AMERICAN DECISIONS.

### COURT OF APPEALS OF MARYLAND.<sup>1</sup>

### SUPREME COURT OF PENNSYLVANIA.<sup>2</sup>

#### ASSUMPSIT.

*Transfer of Contract.*—Thompson contracted to buy an interest in two oil-wells, afterwards an oil company was incorporated to which Thompson transferred his interest, the vendors in the mean time receiving and selling the oil; by agreement, the vendors made the deed to the corporation, and dated it back to the date of the contract, agreeing to deliver Thompson's share of the oil to the company: *Held*, that *assumpsit* in the name of the company for oil received by the vendors between the contract and the incorporation could be maintained: *Snow v. Thompson Oil Co.*, 59 Pa.

The facts constituted an original contract between the vendors and the company: *Id.*

#### BANKS.

*Usage—Special Deposits—Contracts for Payment in Coin.*—On the 30th of December, 1861, A. sent to the Chesapeake Bank \$3000, in gold coin of the United States, which in accordance with a previous agreement, was received as a *special deposit*, and entered on the bank-book of A., as follows: "1861, Dec. 30th, Cash (coin) \$3000." At the date of this deposit, the banks of the state had suspended specie payments, and gold coin was at a small premium. A. drew two checks

<sup>1</sup> From J. Shaaf Stockett, Esq., Reporter; to appear in 29 Md. Rep.

<sup>2</sup> From P. Frazer Smith, Esq., Reporter; to appear in 59 Pa. Rep.



on the bank for the amount so deposited—one dated the 27th of May, 1864, for \$3000, "in gold coin," the other dated 28th May 1864, for \$3000, "in coin." When the first was presented gold was refused, and notes were offered, which were declined; and the like occurred with the second check. The bank-book of A. was balanced at different times between the date of the deposit and the dates of the checks, and the balance of money in bank to A.'s credit was never under \$3000. On the 28th of May 1864, gold was at eighty-five and eighty-six-and-a-half premium. On the 2d of July 1864, A. brought his action against the bank to recover the amount of the deposit in specie. *Held*:—

That the single entry in the bank-book of the plaintiff of the deposit made on the 30th of December 1861, apart from the other entries in the book, was admissible as evidence on his behalf for the purpose of verifying the testimony of the witness, who testified as to the circumstances of the deposit, and of showing the nature of the entry itself, as indicative of the character of the deposit—the defendant being at liberty to use the other entries;

That the plaintiff could properly introduce evidence to show, that according to the general and well-known usage of the banks in the city of Baltimore, existing before and at the time of the deposit, and ever since, the entry in his bank-book imported an agreement on the part of the defendant to return the deposit in kind;

That the subsequent payment of checks, and the striking of balances in the bank-book of the plaintiff, from time to time, did not necessarily extinguish the special deposit;

That if the contract between the plaintiff and defendant be established, as alleged by the former, then he is entitled to recover in specie the amount of the coin so deposited, with interest thereon payable in like currency, from the time of the demand;

Whether the Legal Tender Acts of Congress be constitutional or otherwise, a contract which provides for payment in coin, may be enforced in conformity with its stipulations, and judgment may be rendered for the amount in coin, and the same enforced by execution, on which coin only shall be collected: *Chesapeake Bank v. Swain*, 29 Md.

#### BROKER.

*Commissions*.—A broker, to be entitled to his commissions for negotiating a sale of property, must find a purchaser in a situation, and ready and willing to complete the purchase according to the terms agreed on, and who ultimately becomes the purchaser: *Kimberly v. Henderson*, 29 Md.

#### CONGRESS.

*Act of 1864 as to Compensation to Members for Services*.—A., a lawyer, was a candidate for Congress at the election in 1864: neither he nor his competitor received a certificate of election. On the 20th of April 1865 he procured from the war department the discharge of a drafted man, under a contract previously made. On the 19th of February 1866, he obtained his seat on his *prima facie* case and was ousted July 16. *Held*, that the contract was not in violation of the Act of Congress of June 11th 1864, prohibiting members of Congress, &c., from receiv-

ing compensation for services before a department, &c.: *Bowman v. Coffroth*, 59 Pa.

A. was not a member of Congress within the meaning of the act: *Id.*

The contract was against public policy and void, whether compensation for the services was fixed or contingent: *Id.*

CONTRACT. See *Congress*.

*Privilege on Another's Land.*—Cowan by writing granted to Johnston and others as partners, the privilege to take clay from his land for twenty years at 12 cents per ton; to pay \$150 at the end of every six months, although they should not then have taken away so much clay as would amount to that sum. *Held*, that the writing was an instrument for the payment of money within the Affidavit of Defence Law: *Johnston et al. v. Cowan*, 59 Pa.

The plaintiff by a special count set out that the defendants agreed in writing to pay him "\$150 on the 1st of October 1866, \$150 on the 1st of April 1867, \$150 on the 1st of October 1867, and \$150 on said days semi-annually thereafter, a copy of which agreement is hereto attached," &c. *Held*, to be sufficiently specific for the court to order a liquidation by the prothonotary: *Id.*

Filing the agreement was of itself a copy of the claim, and no more could be recovered than was due on it: *Id.*

The writing was an agreement to pay for the privilege of taking clay whether exercised or not: *Id.*

The sums to be paid if the *minimum* of clay was not taken out were liquidated damages, being a payment for a privilege and the contract not being a mere license: *Id.*

The agreement was signed by the grantor, and the firm name was signed "per J. R.," one of them. *Held*, that if the grant of an interest in land, it was a sufficient signing within the Statute of Frauds: the owner having signed and that bound him: *Id.*

The owner who conveys must be bound by writing, but the other party for anything contained in the statute need not so be bound: *Id.*

CORPORATIONS. See *Railroad*.

*Contracts ultra vires.*—The Maryland Hospital agreed with F., in consideration of \$1200, to support his sister, then a lunatic patient in the institution, for the remainder of her life. The money was paid. F. also fully paid for the support of his sister to the 1st of July 1863, and the sum paid in commutation relieved him from that date from any further charge in the future for her support. The lunatic died on the 12th of August 1864. Subsequently, F. sued the hospital to recover back the sum he had paid under the contract, less the necessary expenses incurred in the support of his sister, from the 1st of July 1863 to the 12th of August 1864. *Held*:—

1st. That the hospital had no power under its charter to make this contract with F.; it was *ultra vires* not binding on the corporation, and could not have been enforced in favor of F.;

2d. That the contract was neither *malum in se* nor *malum prohibitum*, and the parties to it were not *in pari delicto*, and F. was entitled to recover back the sum paid by him, less the amount properly charge-

able as a fair and reasonable allowance for the care and keeping of his sister during the period which intervened between the 30th of June 1863 and the 12th of August 1864, the date of her death: *Maryland Hospital v. Foreman*, 29 Md.

#### CRIMINAL LAW.

*Disturbance of a Meeting.*—Maliciously disturbing a meeting of school directors is indictable at common law: *Campbell v. Commonwealth*, 59 Pa.

It is too late to make objections to the form of an indictment in the Supreme Court: *Id.*

#### ESTOPPEL.

*Silence when there is Duty to speak.*—Positive acts tending to mislead one ignorant of the truth, which do mislead him to his injury, are good ground of estoppel, and ignorance of title on the part of him who is estopped will not excuse him: *Chapman v. Chapman and Gansamer*, 59 Pa.

Silence will postpone a title when one knowing his own right should speak out: *Id.*

One led by such silence ignorantly and innocently to rest on his title, believing it secure, and to expend money and make improvements, without timely warning, will be protected by estoppel: *Id.*

*Sale of Public Property.*—A., an officer of the United States army, took a horse belonging to the government, and having had the brand removed used him as his individual property for some time, and then sold him to B., who for nearly a year hired him out as a public livery-horse to parties, both civil and military, in the city of Baltimore. No steps were taken during this time by any agent of the United States Government to recover the horse. B. finally sold the horse to C., and shortly thereafter he was taken out of his possession under an order of the assistant provost-marshal, as the property of the United States Government. In an action against B., by the last purchaser, to recover what he had paid for the horse, it was held:—

1. That the government was not estopped from reclaiming the horse as its property;
2. That persons dealing with agents or officers in regard to public property, are bound to know the extent of their authority;
3. That the bare possession of the horse by A., with the consent of the officers of the government, and the sale by him to B., were not sufficient to pass title to the purchaser;
4. That although A. may have obtained possession of the horse from the quartermaster, and B. may have been a *bonâ fide* purchaser, a sale thus made, without the authority or assent of the government, could not operate as a transfer of title against the latter: *Johnson v. Frisbie*, 29 Md.

FRAUDS, STATUTE OF. See *Contract*.

#### INSURANCE.

*Partnership Property.*—Goods were owned by two jointly; in effecting an insurance the agent told one that to insure the interest of both,

it made no difference whether or not both names were in the policy; he received a premium proportionate to the whole, and a policy was issued in the name of one. *Held*, that these facts showed a mistake in the agent and were admissible in evidence, and that upon a total loss the whole interest might be recovered in a suit in the name of the one to whom the policy had been issued: *Manhattan Ins. Co. v. Webster*, 59 Pa.

Each partner being liable in *solido* for the firm engagements, has a right to have the firm assets applied in the first instance to the payment of the firm debts: *Id.*

The interest of a partner is only his proportion of the capital or profits after all the debts are paid: *Id.*

A partner has an insurable interest in the entire stock, and on the receipt for a loss of insurance he must account to the firm: *Id.*

#### MASTER AND SERVANT. See *Negligence*.

##### • NEGLIGENCE.

*Injury by Act of Fellow-servant*.—When several persons are employed as workmen in the same general service, though in different parts of it, and one of them is injured through the carelessness of another, the employer is not responsible unless he had employed unfit persons for the service: *O'Donnell v. Allegheny Valley R. R. Co.*, 59 Pa.

*Ryan v. The Pennsylvania Railroad Co.*, 11 Harris 384, remarked on: *Id.*

A carpenter working as such for a railroad company, was carried on the company's cars to and from his work as part of his contract of hiring. He was not to be esteemed as employed in the same general service with the hands running the train or repairing the track of the road, so as to relieve the company from responsibility for injury to him from their negligence: *Id.*

The master is bound to use ordinary care in providing suitable structure, machinery, tools, &c., and in selecting proper servants, and is liable to other servants in the same employment, if they are injured by his own neglect of duty: *Id.*

A railroad company is bound to furnish a safe and sufficient roadway to its servants, as well as others travelling over it. The remote negligence of servants as to the roadway will not excuse the non-performance of such duty: *Id.*

If the substructure of a road be suffered to lie until it has become rotten and unsafe, it is the negligence of the company: *Id.*

Casualty from such cause is not an *ordinary peril* which one taking service in the company is presumed to incur: *Id.*

In a suit by an employee of a railroad company who held the relation of a passenger, the court charged, that the baggage-car is an improper place for a passenger to ride; whether the rule against it was communicated to him or not, if he left his seat in the passenger-car and went into the baggage-car it was negligence, which nothing less than a direction or invitation from the conductor would excuse; such invitation should not be inferred from his having ridden there frequently with the

knowledge of the conductor, and without objection. *Held*, to be error: *Id.*

The conductor is the person to administer the rules of the company, and apply them according to the circumstances. The passenger-travel is under his directions and should conform to them. From the nature of his position he must exercise some discretion: *Id.*

*Contributory Negligence of Plaintiff.*—In an action whose *gravamen* is negligence, it is the duty of the plaintiff to show a case clear of contributory negligence. There must be shown a *prima facie* case resulting exclusively from the wrong of the defendant, before he can be called to answer: *Waters v. Wing*, 59 Pa.

The plaintiff's horse was killed by the shaft of the defendant's carriage running into him, both being on a public highway. The defendant asked the court to charge: "That the defendant had a right to be on the public highway, and if the jury believe that at the time of the alleged accident he was travelling in an ordinary manner, he is not liable for an injury resulting from such use of the public thoroughfare." *Held*, that the point should have been affirmed: *Id.*

#### PARTNERSHIP. See *Insurance*.

#### RAILROAD. See *Negligence*.

*Negligence.*—It is the duty of a railroad company as of a natural person to exercise its rights with a considerate and prudent regard for the rights and safety of others: *Pennsylvania R. R. Co. v. Barnett*, 59 Pa.

It is not a justification that the act producing the injury was lawful or done in exercising a lawful right, if the injury arose from doing it negligently: *Id.*

The engine of the defendants having given no notice of its approach whistled under a bridge whilst a traveller was passing over it: his horses took fright, ran off, and injured the traveller. *Held*, that if danger might be reasonably apprehended, it was the duty of the company to give some warning: *Id.*

If it would have been negligence in the traveller to drive upon the bridge just as the train was about to pass under it, had he been aware of its approach, he was entitled to notice, and it was the duty of the company to give it: *Id.*

Negligence is always a question for the jury, when there is any doubt as to the facts or the inference to be drawn from them: *Id.*

If danger to the person or property of others at any point may be reasonably apprehended, or is likely to result from the running of trains without notice, it is the duty of the company to give notice: *Id.*

Sounding the whistle under a bridge as a traveller was passing over, which causes the horses to run away through fright and injure the traveller, was a sufficiently proximate cause of injury to create a liability on the company: *Id.*

# I N D E X.

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## ACCORD AND SATISFACTION.

Where there is no dispute between parties as to the facts, or amount of claim, a receipt of less than full amount does not constitute an accord and satisfaction. *Beardsley v. Davis*, 377.

## ACKNOWLEDGMENT. See DEED, 2.

## ACTION. See ESTOPPEL, 2; LIMITATIONS, 2; VENDOR AND PURCHASER, 17; WASTE.

1. Will lie against conveyancer for error in judgment, and rule of liability is the same as in the case of lawyers and physicians. *Watson v. Muirhead*, 310.

2. Will not lie to compel one to render an account and to re-convey real estate, which he holds under a conveyance made to defraud creditors. *Sweet v. Tindal*, 438.

## ACTS OF CONGRESS.

1839, Feb. 28. See COURTS, 15.

1845, Feb. 26. See INTERNAL REVENUE.

1850, July 29. See VESSELS, 2.

1852, August 30. See CONSTITUTIONAL LAW, 18.

1855, Feb. 10. See ALIEN, 1.

1855, March 6. See CONSTITUTIONAL LAW, 18.

1861, July 13. See INTERNATIONAL LAW, 12, 17.

1862, — — See CONFEDERATE STATES, 5.

1862, Feb. 25. See LEGAL TENDER NOTES, 2.

1863, March 3. See COURTS, 15.

1864, June 11. See CONGRESS.

1864, June 30. See STAMPS, 6.

1865, Feb. See TAXATION, 2.

1867, Feb. 5. See TAXATION.

1867, March 2. See BANKRUPTCY, 1.

## ADMINISTRATOR. See EXECUTOR.

## ADMIRALTY. See COMMON CARRIER, 9.

1. A cause of action to be cognisable in admiralty must relate to the business of commerce and navigation. *People v. Steamer America*, 182.

2. A state pilot law, enacting that all vessels *shall* take a pilot, but containing no clause exempting the vessels from liability for the pilot's mismanagement, does not protect a vessel, with a pilot on board, from liability for torts done by it, though such torts are the result of the pilot's negligence. *The China*, 437.

3. State statutes authorizing actions *in rem* against vessels for causes cognisable in admiralty are statutes conferring admiralty jurisdiction, and are therefore unconstitutional. *Jackson v. Steamer Kinnie*, 470.

4. A lien created by a state law against a domestic vessel for supplies furnished in a home port cannot be recognised or enforced in a court of admiralty. *Id.*

**ADMIRALTY.**

5. Where in case of collision, there is reasonable doubt as to which vessel is to blame, the loss must be sustained by the one on which it has fallen. *The Grace Girdle*, 438.

**AFFIDAVIT OF DEFENCE. See PRACTICE, 3.**

**AGENT.** See **BAILMENT**, 2; **BROKER**, 1, 3; **DAMAGES**, 7; **STATUTE OF FRAUDS**, 5; **INSURANCE**, 9; **INTERNATIONAL LAW**, 10; **VENDOR AND PURCHASER**, 13.

1. A local board of directors, established by a foreign corporation in New York, under regulations of the statute of that state, no matter how complete its organization or how full its authority to transact business without consultation with its principal, is still a mere agency, and not a distinct corporation. *Robinson v. Life Assurance Co.*, 166.

2. Therefore a contract, as of insurance, made by this New York board with the plaintiff, a citizen of Virginia, was the contract of the foreign corporation with plaintiff, and the government of the foreign corporation being a neutral and having recognised the government of the plaintiff as a belligerent, the contract was not suspended by the civil war in America, and payment of premiums to a sub-agent of the corporation, at Richmond, was a valid payment to the corporation. *Id.*

3. A party dealing with an agent for a special purpose must ascertain at his own peril the agent's power. *The National Iron Co. v. Bruner*, 244.

4. An agent with restricted power to sell land at a given price, cannot bind his principal, by representations as to quantity or quality. *Id.*

5. The fact that an instrument is made payable at a bank does not make the bank an agent of payee to receive payment, unless he actually deposits the instrument there, or in some express manner authorizes the bank to act for him. *Ward v. Smith*, 354.

6. When an instrument is lodged with a bank for collection, the bank becomes the agent of the payee or obligee to receive payment. The agency extends no further, and without special authority an agent can only receive payment of the debt due his principal in the legal currency of the country, or in bills which pass as money at their par value by the common consent of the community. *Id.*

7. Authority to receive payment implies authority to receive it in whatever was regarded as money at the time and place of payment. Confederate notes being so regarded and being received in good faith by the agent were a valid medium of payment, as between the plaintiff and the corporation. *Id.*

8. Accepting employment hostile to the interests of his employer, is guilty of breach of contract and may be discharged therefor. *Morrison v. Ogdensburg & Champlain Railroad*, 382.

**AGREEMENT.** See **ATTORNEY**, 1; **STATUTE OF FRAUDS**, 1-6; **INTEREST**, 1.

It is not necessary to constitute an agreement that a proposition made by letter should be accepted expressly, it is sufficient if acted upon and complied with. *Beardsley v. Davis*, 377.

**ALIEN.**

1. The Act of Congress of February 10th 1855, which declares "that any woman, who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen," confers the privileges of citizenship upon women married to citizens of the United States, if they are of the class of persons for whose naturalization the previous Acts of Congress provide. *Kelly v. Owen et al.*, 444.

2. The terms "married" or "who shall be married," in the act, do not refer to the time when the ceremony of marriage is celebrated, but to the state of marriage. *Id.*

3. The citizenship of the husband wherever it exists, confers citizenship on the wife. *Id.*

4. Any woman being a free white person, and an alien friend, married after the approval of the Act of February 10th 1855, to a man who was, at the

**ALIEN.**

time of such marriage, a naturalized citizen of the United States, becomes, by such marriage, *ipso facto*, herself a citizen of the United States, and capable of inheriting real estate, although she resided in a foreign country at the time of her said marriage, and has continued her actual residence there ever since. *Kane v. McCarthy*, 482.

5. And any alien woman answering the above description, and married before the approval of the said act, to an alien husband, who has been subsequently naturalized, becomes by his naturalization, *ipso facto*, herself a citizen of the United States, and capable of inheriting real estate. *Id.*

6. It is the status of being married to—being the wife of—a citizen, which makes the alien woman a citizen of the United States. *Id.*

**AMENDMENT.**

To a writ which changes the names of the parties to the action, not allowable. *Lewis v. Locke*, 501.

**ARBITRATION.**

1. An Act of Congress referring a claim to an officer of one of the executive departments to examine and adjust, is not such an arbitrament and award in the technical sense, as to bind the parties like a submission. *Gordon v. United States*, 244.

2. Hence a subsequent act repealing the one making the reference, impairs no right and is valid. *Id.*

3. A mere submission to arbitration will not be necessarily a discontinuance of a pending suit. *Lary v. Goodeno*, 568.

**ARMY.** See **MILITARY SERVICE.****ASSIGNMENT.** See **DEBTOR AND CREDITOR**, 7.

The delivery of a promissory note payable to bearer is an assignment of it. *Cox's Executors v. Matthews*, 510.

**ASSIGNMENT FOR BENEFIT OF CREDITORS.** See **BANKRUPTCY**, 11-14.**ASSUMPSIT.** See **LANDLORD AND TENANT**, 5.

1. Lies to recover plaintiff's share, on an agreement between plaintiff and defendant to sell real estate and divide profits. *Bruce v. Hastings*, 506.

2. A school district may maintain an action for money had and received, against a school committee who have neglected to appropriate money in their hands as directed. *School District No. 7 in Auburn v. Sherburne*, 568.

3. Lies to recover money advanced to a corporation for shares of its capital stock. *Swazey v. Choate Manufacturing Co.*, 569.

4. An action of *assumpsit* may be brought against a city or town to recover a reward offered for the apprehension of a criminal. *Janvriq v. Town of Exeter*, 570.

5. Will not lie to recover money voluntarily paid with full knowledge of the facts. *Lester v. The Mayor*, 695.

6. Where a party who has contracted to purchase an interest in certain oil-wells, transfers his interest to an oil company afterwards incorporated, and the deed is made directly to such company by the vendors, the company may maintain *assumpsit* for the oil received by the vendors, between the date of the contract and the incorporation. *Snow v. Thompson Oil Co.*, 753.

**ATTACHMENT.** See **PRACTION**, 2.

1. In Illinois, an attachment on personal property, takes precedence of an unrecorded mortgage. *Green v. Van Buskirk*, 246.

2. An attachment once dismissed loses its priority, even though re-instated by consent of the defendant. *Murphy v. Bruce*, 308.

3. Judgment cannot be rendered against a garnishee, where his contract is to pay the defendant in attachment, in property. *Weil v. Tyler*, 378.

4. An attachment, under which goods have been seized, which is set aside for irregularity, affords no protection to the plaintiffs. *Lyon v. Yates*, 379.



**ATTORNEY.**

1. An agreement made in the presence of an attorney between his client and a third person, is not a privileged communication. *Carr v. Weld*, 244.
2. An attorney's license is *prima facie* evidence of his authority, to appear for any one, but if denied he must furnish evidence of his retainer. *Clark v. Willett*, 501.
3. An attorney at law has no authority as such to sell or assign the claim of his client. *Rowland v. Slate and Meyer*, 632.

**AWARD.** See **ARBITRATION.****BAGGAGE.** See **COMMON CARRIER**, 1, 6.**BAILEMENT.**

1. Where a bailee of goods absolutely refuses to deliver them to the owner, on demand; or assumes to be himself the owner; or interposes an unreasonable objection to delivering them; or exhibits bad faith in regard to the transaction; a conversion of the property may be inferred. *Carroll v. Mix*, 59.
2. An agent cannot pledge or mortgage goods, to secure an advance on his own account. *First National Bank of Macon v. Nelson*, 309.
5. Warehousemen and forwarders are responsible for the proper custody and storage of goods in their charge, and are bound to use ordinary care and diligence in their protection. *B. & O. R. R. Co. v. Schumacher*, 699.

**BANK.** See **AGENT**, 4, 5; **LIMITATIONS**, 4; **STOCK**, 1.

1. A national banking association organized from a state bank and receiving its assets, is liable for its debt. *Thorp v. Wegefaith*, 62.
2. After a national association had become insolvent, its debtor could not purchase notes for which it was liable, to set-off against his debt. *Id.*
3. A bank cannot avail itself of the neglect of a third person to prevent the recovery by one to whom it has paid out a spurious note. *Burrill v. Watertown Bank and Loan Co.*, 183.
4. A bank having received \$3000, in gold coin of the United States, as a special deposit, will be compelled to return to the depositor the amount of coin, in specie, with interest thereon in specie, from the time of demand. *Chesapeake Bank v. Swain*, 754.

**BANKRUPTCY.****I. Jurisdiction.**

1. The Bankrupt Act does not absolutely and totally suspend or abrogate state insolvent laws. *Hawkins' Appeal*, 205.
2. A voluntary assignment by a debtor, good at common law and made in the form prescribed by the insolvent law of the state, held valid, although the United States Bankrupt Act was in existence and applicable to the case at the time of the assignment. *Id.*
3. And the proceedings of the probate court in administering upon the insolvent estate so assigned held valid. *Id.*
4. Where there is no conflict of jurisdiction between the officers of the state courts and the Court of Bankruptcy, the latter will not interfere. *Re Davidson*, 236.
5. Discharge refused for want of jurisdiction, where the bankrupt was member of a firm in New Jersey, but had also an office in New York where he received and wrote his letters. *Re Little*, 236.
6. District Court has no power by injunction, to stay proceedings in another court by reason of bankruptcy proceedings pending in another state. *In re Richardson*, 236.
7. The appellate jurisdiction, properly so called, of the Circuit Court in bankruptcy matters is limited to controversies between assignees and the claimants of adverse interests, and between assignees and creditor-claimants respecting the allowance of claims. *In re Alexander*, 423.
8. The supervisory jurisdiction of the Circuit Court includes all decisions of the District Court, or the district judge at chambers, which cannot be reviewed

**BANKRUPTCY.**

by appeal or writ of error under the appellate jurisdiction given by the 8th section. *In re Alexander*, 423.

9. An appeal must be taken in the time and manner prescribed by the act. The regulations as to appeals are regulations of jurisdiction, and cannot be enlarged or restricted by the Circuit or District Courts. *Id.*

10. The Circuit Court under the 3d section of the Bankrupt Act has jurisdiction to revise the rulings and judgment of the District Court in proceedings in bankruptcy upon bill filed. *Langley v. Perry*, 427.

**II. Acts of Bankruptcy.** *See post*, 25, 27.

11. Assignment by an insolvent of all his property, for benefit of preferred creditors, is an act of bankruptcy. *Grow v. Ballard*, 237.

12. Suspension of payment of commercial paper for fourteen days, and unexplained, act of bankruptcy. *Re Ballard*, 237.

13. Non-payment of promissory notes at maturity, which are not commercial paper, no ground for adjudication of bankruptcy. *Re Lowenstein*, 237.

14. A general assignment of all a debtor's property for the benefit of his creditors, is not necessarily a conveyance with intent to delay, defraud, or hinder creditors. *Langley v. Perry*, 427.

15. And where such an assignment is made with intent to secure an equal distribution of all the debtor's property among all his creditors, it is not necessarily a conveyance of property with intent to defeat or delay the operation of the Bankrupt Act. *Id.*

16. To make such an assignment an act of bankruptcy, it must be made with intent to delay, defraud, or hinder creditors within the meaning of the statute of 13 Elizabeth, or with intent to defeat or delay the operation of the Bankrupt Act. *Id.*

**III. Effect of the Institution of Proceedings.**

17. Property of bankrupt after filing petition cannot be taken in execution. *Re Wallace*, 237.

18. Property of bankrupt exempt by state and bankrupt law, though levied on by United States marshal, cannot be sold after filing petition. *Re Griffin*, 237.

19. When attachment is dissolved by commencement of proceedings in bankruptcy, the title of the property vests in assignee. *Re Houseberger*, 237.

20. Vendor's equitable lien upheld by Court of Bankruptcy. *Re Perdue*, 237.

21. Judgment-creditors may issue execution and sell their debtor's property. *Re Ken*, 237.

22. Bankrupts before appointment of assignee cannot be purchasers of the estate. *March v. Heaton*, 238.

23. Feme covert trader may avail herself of her coverture to defeat debts in bankruptcy, unless she has conformed to statutes governing such traders. *Re Slichter*, 238.

24. While adjudication of bankruptcy stands unrevoked, inquiry into validity of petitioning creditor's debt is precluded. *Re Fallon*, 238.

**IV. Practice.** *See post*, 40, 57, 74.

25. Where A. being indebted to B. and before insolvency, sold the latter an estate, and credited him on his books with the amount of such indebtedness, and after insolvency in a settlement with B. deducted the amount of such indebtedness from the purchase-money: it was held that the payment was really made at the time of sale, that it was a legitimate transaction, and not a fraudulent preference within the meaning of the Bankrupt Act. *Re Isaac Rosenfeld, Jr.*, 44.

26. Where specification charges that a particular debt was paid after the passage of the Bankrupt Act, proof is inadmissible that other debts were paid after the passage of said act, but not the particular debt specified. *Id.*

27. Insurance made upon house and furniture in pursuance of covenants in lease, is not a fraudulent preference. *Id.*

28. Bankrupt not liable to arrest for a claim that would be discharged by an adjudication of bankruptcy. *Re Kimball*, 236.

**BANKRUPTCY.**

29. Original papers referred to in deposition and annexed thereto, cannot be withdrawn from the files. *Re McMinn*, 238.

30. Creditor may petition court to be paid a judgment out of funds in hands of assignee. *Re Smith*, 238.

31. Two or more partners may be adjudged bankrupts upon the petition of one or more of them. *Re Crockett*, 238.

32. Omission to publish notice of meeting in one of the papers designated, also failure to state in warrant the names, residences, and amount of debts, sufficient irregularity to set aside proceedings. *Re Hall*, 238.

33. Bankrupt may be called upon at any time to submit to an examination. *Re McBrien*, 238.

34. Order for examination always made on petition for final discharge, by the court; other examinations must be on petition of assignee or creditors. *Re Brandt*, 238-239.

35. Creditor must apply by petition or affidavit for order to examine bankrupt under section 26. *Re Adams*, 239.

36. Each creditor may examine under section 26, but examination regulated by register. *Id.*

37. Bankrupt must answer questions relating to property in which he might have an interest. *Re Bonsted*, 239.

**V. Discharge.**

38. Expenditures incurred by bankrupt while insolvent in support of his family, in the absence of evidence as to their character is no ground for refusal of discharge. *Re Isaac Rosenfeld*, 44.

39. Servants' wages paid after passage of Bankrupt Act, as necessary family expenses, and payments made to counsel for services "rendered and to be rendered," when made without fraud, are no grounds for refusal of discharge. *Id.*

40. Petition to have decision of District Court refusing discharge on account of fraud, reviewed, denied. *Re Robinson*, 236.

41. Must be applied for within one year of adjudication. *Re Willmott*, 239.

42. Under section 29, it is only where bankrupt can apply for his discharge in less than six months, that he must within a year. *Re Greenfield*, 239.

43. Will not be refused for omission of names of creditors from schedule with their consent and knowledge. *Re Needham*, 239.

44. Refused where bankrupt swore falsely that he had no assets. *Re Rathbone*, 239.

45. Creditor secured by deed of trust of land, must proceed according to rule, in opposing discharge. *Re McVey*, 241.

46. The concealment of bankrupt's effects, or a false affidavit to the inventory, must be shown to be intentional in order to preclude discharge. *Re Wyatt*, 239.

47. Refused where the proof of fraudulent concealment of property was not overborne by positive testimony. *Re Goodridge*, 239.

48. Payment of attorney's fees is not such a preference as will prevent discharge of bankrupt. *Re Sidle*, 240.

49. Assignment of a claim, made to secure pre-existing indebtedness and when bankrupt was insolvent, is ground for refusing discharge. *Re Foster*, 240.

50. Payment of one creditor in full by person not contemplating bankruptcy, will not prevent discharge. *Re Locke*, 240.

51. The bare denial of bankruptcy, insufficient to show that assignment was not made in contemplation of bankruptcy. *Re Broadhead*, 240.

52. Refused, on failure to keep books of account whether with fraudulent intent or not. *Id.*

53. The intent of non-keeping of books immaterial. *Re Newman*, 240.

54. Vague and general specifications of fraud not allowed in opposition to discharge. *Re Hansen*, 240.

55. Opposition to discharge on the ground of debt being fraudulently created, insufficient. *Re Doody*, 240.

**BANKRUPTCY.**

56. Will not be withheld on the ground that debts were contracted in a fiduciary character. *Re Tracey*, 241.

57. Specifications in opposition to discharge may be filed *nunc pro tunc*, in proper cases. *Re Grefe*, 241.

58. Creditors not having proved their debts may oppose. *Re Boutelle*, 241.

59. A surety on an appeal bond is no longer liable, where the principal is discharged in bankruptcy. *Odell v. Wooten*, 318.

**VI. Property exempted.** See *post*, 61.

60. Under the provision of the 14th section of the Bankrupt Law of 2d March 1867, excepting from the operation of the act the property of debtors exempted from levy and sale by the laws of the state, a vested expectant interest of a bankrupt in a sum of money payable at his own death, or at the death of another person, may, in Pennsylvania, be set apart for the use of the bankrupt; so, however, that its appraised present value, estimated as in cases of life insurance, does not exceed \$300, or that the bankrupt does not receive more than \$300, if the value thus estimated exceeds that amount. *Bennett's Case*, 34.

**VII. Rights and Duties of Assignee.** See *ante*, 19.

61. Real estate cannot be allotted or set apart by the assignee to a bankrupt under section 14 of the Bankrupt Act, even though the personal property, excluding the articles exempted by the state law, be less than the amount which the assignee thinks should be allowed the defendant. *Matter of Thornton*, 42.

62. Money may be so allotted to the bankrupt. *Id.*

63. Judge cannot interfere, where assignee is chosen by the greater part in number and value of creditors. *Re Grant*, 241.

64. Court will not sanction solicitation of votes for assignee. *Re ———*, 241.

65. Register can convey estate to assignee where there is no "opposing interest." *In re Wylie*, 241.

66. Property fraudulently disposed of may be recovered by assignee in summary manner. *Neall v. Beckwith*, 241.

67. Cannot recover property from creditor in an action of trover unless fraud in the transfer be shown. *Wadsworth v. Tyler*, 242.

68. A chattel mortgage executed by one co-partner under seal, and assented to by the other by parol, is valid. *Hawkins v. Bank*, 242.

**VIII. Proof of Debts.**

69. A judgment for a fine imposed as a penalty for crime is not a debt within the meaning of the Bankrupt Act, and not being included in the special provisions allowing certain claims to be proved as debts, it cannot be proved against the estate of a bankrupt. *Matter of Sutherland*, 39.

70. A creditor of a bankrupt holding a mortgage as security for his debt, must prove his debt, and then apply to court to have security sold. *Re Bittell*, 242.

71. A debt created by fraud is provable. *Re Rundle*, 242.

72. A judgment obtained on breach of promise to marry is a debt provable, and is barred by discharge. *Re Sidell*, 242.

73. Judgment obtained after adjudication of bankruptcy is not provable against estate of bankrupt. *Re Williams*, 242.

74. Action to recover provable debt must be stayed until discharge is determined on. *Re Rosenberg*, 242.

**IX. Distribution.**

75. A state court cannot interfere with the distribution of bankrupt's assets. *Re Bridgman*, 243.

76. The obligee of a joint and several bond of members of a co-partnership, is entitled to dividends out of the assets of the individual bankrupt members of the firm. *Re Bigelow*, 243.

**X. Register.** See *ante*, 65.

77. Must certify conformity or non-conformity on presentation to him by bankrupt, of oath required by section 29. *Re Pulver*, 241.

## BANKRUPTCY.

78. May fill up blank, issue summons, &c., and proceed the same as the judge when there is no controversy. *Re Brandt*, 243.

79. Has power to order the payment of fees and expenses out of funds in the hands of assignee. *Re Lane*, 243.

80. Must exercise proper legal discretion to prevent unnecessary and unreasonable delays. *Re Hyman*, 243.

## XI. Costs.

81. Compensation of counsel for petitioning creditors in involuntary bankruptcy, is taxable as part of the costs of the proceedings, and payable out of the fund realized. *Matter of O'Hara*, 113.

82. But the principle does not extend to give petitioning creditors a right to contribution from the other creditors in case of failure to realize a sufficient fund to pay expenses and counsel fees. *Id.*

83. Bankrupt summoned by creditor as a witness is not entitled to witness fees. *Re McNair*, 243.

84. Party for whom services are performed by the officers of the court, must pay the fees incident to such services. *Re Mealy*, 243.

85. Travel by United States marshal as messenger to make return, is necessary, and five cents a mile is proper charge therefor. *Re Talbot*, 243.

86. Charge of ten cents per folio for preparing notices is not proper. *Id.*

87. An item for attendance is improper charge. *Id.*

BILLS AND NOTES. See ASSIGNMENT; CHECK, 1; EVIDENCE, 13; EXECUTION, 7; INTERNATIONAL LAW, 8; STAMPS, 2-4-6; SURETY, 4.

## I. Rights and Liabilities of Parties.

1. The law of the place, where note stipulating for payment of interest is made, will govern as to rate and rule of casting interest thereon. *Chase v. Dow*, 59.

2. A note payable on demand, and negotiated ten months after it was executed, is subject to the equities of the original parties, in the hands of an innocent holder. *Morey v. Wakefield*, 510.

3. A note due one day after date, with an agreement in writing that the obligees in the note shall have five years to pay it in, cannot be sued on until the expiration of the time, and the Statute of Limitations will not begin to run until then. *Round v. Donnell*, 575.

4. Guaranty of a note, not distinguishable from a general letter of credit, and suit may be maintained in name of person given credit on its faith. *Northumberland Bk. v. Eyer*, 630.

5. A guaranty is not assignable so as to enable the assignee to sue on it in his own name. *Id.*

6. B. made a note payable to J. S. endorsed it: afterwards J. endorsed it and it was discounted by a bank for J. Held, that S. was not liable either to the bank or to J. without evidence *dehors* that he had assumed the liability. *Schafer v. Farmers' & Mechanics' Bank*, 684.

7. The mere endorsement in such case did not authorize the holder to write a guaranty over it, but a special original agreement might be established by proof. *Id.*

8. The payee, who was also an endorser, was incompetent to testify to such a special agreement of the irregular endorser. *Id.*

9. The endorsement is not a note in writing, as required by the Act of April 26th 1855 (Frauds). *Id.*

10. The proof of a collateral liability for the debt of the maker different from that which the endorsement imports cannot be made by parol. *Id.*

## II. Demand and Notice.

11. Any act of endorser tending to put holder of note off his guard, is in law a waiver of demand and notice. *Sheldon v. Horton*, 575.

12. Notice of dishonour left at post office where there is daily delivery sufficient. *Shoemaker v. Mechanics' Bank*, 693.

BOND. See PARTNERSHIP, 4; STAMPS, 5.

Recovery on bond assigned as collateral security, for amount less than face

**BOND.**

of bond does not satisfy and extinguish the bond as against the obligee. *Brumagin v. Chew*, 125.

**BOUNTY.** See PARENT AND CHILD, 2.

1. The right of a person who has enlisted, on a promise to be paid such bounty as a town may vote, cannot be defeated by a subsequent vote to rescind. *Haven v. Town of Ludlow*, 502.

2. A commissioned officer is not entitled to bounty. *Hilliard v. Stewartstown*, 569.

**BRIDGE.** See NEGLIGENCE, 1-2.**BROKER.**

1. An agent employed to sell goods on commission is a mere broker, and as such is authorized to make contracts for the sale and delivery, but cannot make them in his own name nor receive payment therefor. *Dunn v. Wright*, 59.

2. Can sign contract of sale. *Pringle v. Spaulding*, 569.

3. Where an agent is interested as for commissions as a factor or broker, and a contract is made in his name, he may maintain an action on it in his own name. *Telegraph Co. v. Gildersleeve*, 692.

4. Where a broker sent by telegraph, in his name, an order for the purchase of gold on behalf of his principal, which was never transmitted, he may sue in his own name and recover the full amount of damages resulting from the breach of contract. *Id.*

5. Is only entitled to commissions when the purchase is completed as agreed on. *Kimberly v. Henderson*, 754.

**CASES APPROVED, OVERRULED, &c.**

*Olmstead v. Camp*, 33 Conn. R. 532, confirmed. *Todd v. Austin*, 9.

*Flowers v. Todd*, 6 Hill 340, questioned. *Burrill v. Watertown Bank*, 183.

*De Groot v. United States*, 5 Wall. 432, affirmed. *Gordon v. United States*, 244.

*Taylor v. McCune*, 1 Jones 460, remarked on. *Schafer v. F. & M. Bank*, 684.

*Keyner v. Shower*, 1 Harris 446, commented on. *Schafer v. F. & M. Bank*, 684.

*Commonwealth v. Shelby*, 13 S. & R. 354, explained. *Okeson's Appeal*, 703.

*English v. Harvey*, 2 Rawle 309, explained. *Okeson's Appeal*, 703.

*Leese v. Clarke*, 29 Cal. 672, commented on. *Mayne v. Jones*, 120.

*Ryan v. Pennsylvania Railroad Co.* 11 Harris 384, remarked on. *O'Donnell v. Allegheny R. R.*, 757.

**CANAL.** See VENDOR AND PURCHASER, 4.**CANAL-BOAT.** See MORTGAGE, 3.**CHECK.** See PAYMENT, 2.

1. Received in payment of a draft, if not paid, will not make the draft invalid as an obligation. *Kelty v. National Bank of Erie*, 438.

2. Is subject to the same rule as draft, as to time of presentment. *Id.*

**CHARITABLE USES.** See WILL, 2.

The object of the statute of charitable uses in England was not to restrain gifts to such uses, but to enforce and make valid such gifts in certain cases in which they had before been held void because the object was too vague and indefinite. *Norris et al. v. Thompson's Ex'rs. et al.*, 244.

**CHURCH.** See EASEMENT, 1-3.**CITIZEN.** See INTERNATIONAL LAW, 11; NUISANCE, 1.**COIN.** See LEGAL TENDER NOTES, 2-3; BANK, 4.

1. Gold paid into Court, on a conditional verdict in ejectment, prior to the

## COIN.

Legal Tender Law, cannot be recovered in an action of trover subsequently to the passage of the Law. *Aurentz v. Porter*, 61.

2. The clause in the Act of Congress of February 25th 1862, and two subsequent acts, making notes of United States a legal tender for debts, has no reference to taxes imposed by state authority. *Lane County v. Oregon*, 251.

3. A contract to pay in gold and silver coin is a contract to deliver a certain weight of gold and silver. *Butler v. Horowitz*, 443.

4. Where it appears to be the clear intent of a contract that payment is to be made in gold or silver, damages should be assessed in coin, and judgment entered accordingly. *Id.*

5. Whether the Legal Tender Acts of Congress be constitutional or otherwise, a contract which provides for payment in coin, may be enforced in conformity with its stipulations, and judgment may be rendered for the amount in coin, and the same enforced by execution, on which coin only shall be collected. *Chesapeake Bank v. Swain*, 754.

## COMMON CARRIER. See RAILROAD, 10.

1. The responsibility of an express company is the same as that of a carrier, and it cannot exempt itself from liability for loss from negligence, by an exception in a receipt. *Belger v. Dinsmore*, 185.

2. The owners of a steamboat, employed in towing boats for hire, are not common carriers and hence not insurers. *Wooden v. Austin*, 189.

3. Parties undertaking to tow a boat from one place to another are bound to do so, unless prevented by causes to which at least gross negligence on their part does not contribute. *Id.*

4. Will not be liable for breach of contract to tow a vessel, where he was prevented by the freezing of the river, that being an act of God. *Worth v. Edmonds*, 308.

5. One transportation company, receiving freight from another, is entitled to the benefit of all stipulations affecting its liability made by the latter with the owner. *Manhattan Oil Co. v. Camden and Amboy Railroad*, 309.

6. The holder of a railway passenger ticket is only entitled to passage with such personal baggage as he carries with him at the time. Baggage sent by an after train will be at his risk, and not that of the company. *Wilson v. Railway Co.*, 398.

7. Of passengers is bound to exercise the very highest degree of care and diligence, and liable for the smallest negligence. *Taylor v. Grand Trunk Railway*, 575.

8. Where goods were delivered to one company in a connected line of transportation, dividing the freight according to their respective services, and were described in the bill of lading, as received by the company to whom delivered and to be transported throughout the line, that company was held responsible for any damage occurring upon any portion of the line, on the ground of an implied contract to deliver safely at the end of the route. *Morse v. Brainerd*, 604.

9. A steamboat towing three loaded barges down the Mississippi river, in approaching bridge piers too closely to back or stop, the tow is driven against a pier by a sudden and unanticipated gust of wind: the carrier is not liable for loss or injury of the cargo of one of the barges. *Insurance Co. v. Steamboat Lady Pike*, 614.

CARRIERS BY WATER, 641.

## CONFEDERATE STATES. See FRAUD, 4; INTERNATIONAL LAW, 5.

1. A purchaser at a judicial sale under the judgment of the state court who has paid only in Confederate notes cannot be regarded as a *bond fide* purchaser who has paid. *Cuyler v. Ferrill*, 100.

2. A contract, the consideration of which was Confederate treasury notes, made by citizens residing within the lines of the so-called Confederacy, is legal and valid. *Miller v. Gould*, 310.

3. The so-called Confederate Government was not in the proper legal sense a *de facto* government during the late rebellion. *Chisholm v. Coleman*, 693.

4. A judge of the Circuit Court of Alabama, who entered the service of the

## CONFEDERATE STATES.

Confederate States, forfeited and vacated his office of judge under the state. *Chisholm v. Coleman*, 693.

5. The Act of Congress of 1862, ch. 195, does not prevent a party who was in the Confederate army from acquiring property after the close of the war. *Thomas v. Hunter*, 699.

6. The Confederate States, though not a *de facto* government in the highest sense of that term, were a government of paramount force having actual supremacy within certain territorial limits, and therefore a *de facto* government in such a sense as made civil obedience to their authority the duty of the inhabitants of the territory under their control. *Thorington v. Smith*, 739.

7. Confederate notes as contracts in themselves are nullities, but they must be regarded as a currency imposed on the citizens of the insurrectionary states by irresistible force, and therefore contracts for payment in such currency, made between citizens of the Confederacy in the ordinary course of civil business and without direct intent to assist the insurrection, are valid, and will be enforced by the courts of the United States. *Id.*

## CONFLICT OF LAWS.

Debt contracted in foreign country is payable there, and in the legal currency of such country. *Benners v. Clemens*, 630.

## CONGRESS.

A lawyer who is a candidate for Congress, but has no certificate of election, receiving compensation for professional services before a department, between the time of his election and taking his seat, is not within the Act of June 11th 1864. *Bowman v. Coffroth*, 755.

## CONSTITUTIONAL LAW.

I. *Power of the Executive.*

'THE PRESIDENT'S POWER OF GENERAL AMNESTY, 513, 577.

II. *Power of Legislature.* See VESSEL, 2; WITNESS, 2.

1. The Act of the Legislature of Connecticut of 1864, called the Flowage Act, is not unconstitutional. *Todd v. Austin*, 9.

2. It is no objection to proceedings under the Flowage Act, that the mill is not on the same tract of land upon which the dam is sought to be erected. *Id.*

3. The act entitled "An act making the county treasurer of San Joaquin county *ex officio* tax collector," passed April 2d 1866, was not designed to fill a vacancy in the office of tax collector, but it was to make the treasurer, instead of the sheriff, of San Joaquin county tax collector. In so far as the act provides for the transfer of said office to take place before an election of such treasurer occurs, it is unconstitutional and void. *People v. Kelsey*, 119.

4. The legislature has the constitutional power by enactment to divest an officer of an *ex officio* office to which he had been elected and duly qualified, by a repeal of the law under which he became invested therewith, provided, where such office be created under the Constitution, such repeal does not in effect abolish such office. *Id.*

5. In such case, however, this power does not extend to the transfer of an *ex officio* office which, under the Constitution, is required to be filled by election, to the incumbent of another office who has not been elected to such *ex officio* office. *Id.*

6. The constitutional right of the citizens of one state to sue the citizens of another in the Federal Courts, cannot be defeated by statutory limitation. *Cowles v. Mercer*, 247.

7. The Act of July 3d 1863, of the legislature of New Hampshire, so far as it deprives the owner of a dog of a trial by jury, is unconstitutional. *East Kingston v. Towle*, 569.

8. Land taken by the public for a highway and paid for, cannot be donated to former owner without any consideration. *People v. Commissioners of Highways of Palatine*, 630.

9. A right conferred by the Constitution is beyond legislative interference. *McCafferty v. Guyer*, 694.

10. The Act of June 11th 1866 (for disfranchising deserters) is unconstitutional. *Id.*



## CONSTITUTIONAL LAW.

III. *Judicial Power.*

11. Where a person was regularly indicted, convicted, and sentenced under proceedings in a court of competent jurisdiction, the fact that the judge who presided at the trial and passed sentence was within the class prohibited from holding office by the Fourteenth Amendment to the Constitution of the United States, does not make the sentence a nullity nor entitle the prisoner to a discharge on *habeas corpus*. *Ex parte Griffin*, 358.

12. The third section of the fourteenth amendment did not by its own direct and immediate effect, remove from office persons lawfully appointed or elected before its passage, though they may have been ineligible to hold such office under the prohibition of the amendment. Legislation by Congress was necessary to give effect to the prohibition by providing for removal. *Id.*

13. The exercise of their official functions by these officers until removed in pursuance of such legislation is lawful and valid. *Id.*

14. The government of Virginia formed at Wheeling by the loyal citizens of the state after the passage of the ordinance of secession by the convention at Richmond, having been recognised by the executive and legislative departments of the national government, must be treated by the courts of the United States as the lawful government of the state. *Id.*

15. The Supreme Court of the United States cannot acquire jurisdiction of a cause through an order of a circuit court. *The Alicia*, 446.

IV. *Regulation of Commerce.*

16. The term "commerce," as employed in section 8, art. 1, of the Constitution of the United States, is not limited to an exchange of commodities only, but includes the transportation of passengers. *People v. Raymond*, 118.

17. When the Congress, in the exercise of its constitutional right, has by its legislation established regulations of commerce with foreign nations, and among the several states, its authority is paramount and exclusive, and its enactments supersede all state legislation on those subjects. *Id.*

18. By the enactment of section 285 of the United States Internal Revenue Act, 2 Bright. Dig. 271, the Act of August 30th 1852, and the Act of March 6th 1855, 10 U. S. Stat. at Large 61, 715, Congress has undertaken to regulate the entire business of transporting passengers by sea. *Id.*

19. The act entitled "an act to provide revenue for the support of the government of the state of California, from a tax upon foreign and inland bills, passengers, insurances, and other matters, passed May 14th 1862, is a regulation of commerce within the meaning of section 8, Art. I. of the Federal Constitution, and therefore unconstitutional and void. *Id.*

V. *Obligation of Contracts.*

20. Alterations may be made in remedies, if they do not deprive a creditor of rights he had when the contract was made. *Penrose v. Erie Canal Co.*, 59.

VI. *Taking Private Property.*

21. The provision of the state constitution of Connecticut, that private property shall not be taken for public use without just compensation, is not a grant of power to the legislature, but a restriction upon the right of eminent domain. *Todd v. Austin*, 9.

22. The legislature may lawfully grant rights of easement to individuals or corporations, to enable them to erect and operate structures, the result of which will be beneficial to the public. *Id.*

## CONTRACT. See COIN, 3-4, 5; COMMON CARRIER, 4; CONFEDERATE STATES, 2; STATUTE OF FRAUDS, 3.

1. The rule of comity adopts the law of the country where the contract is made, in determining its nature, construction, and validity, unless such construction is *contra bonos mores*, or against some positive law of the place where the contract is sought to be enforced. *B. & O. Railroad Co. v. Glenn*, 247.

2. No right can be derived under any contract made in express opposition to the laws of the place in which such contract is made. *Id.*

3. A simple request to do an act, will not constitute a contract which is binding. *Wells v. Mann*, 378.

CONTRACT.

4. A court will not set aside a contract for inadequacy of consideration alone. *Kidder v. Chamberlin*, 502.
5. In restraint of trade in particular locality is valid. *McClurg's Appeal*, 630.
6. A contract to pay dollars made between citizens of any state maintaining its constitutional relations with the National Government, is a contract to pay lawful money of the United States, and cannot be modified or explained by parol evidence. *Thorington v. Smith*, 739.
7. But the word dollars if used in a contract between citizens of a foreign state could be shown by parol evidence to mean dollars of a different kind from United States dollars, and the same rule must apply to a contract between citizens of the Confederate States. *Id.*
8. A party entitled to be paid in Confederate notes, can only recover their actual value at the time and place of the contract in lawful money of the United States. *Id.*

CONTRIBUTION.

THE LAW OF CONTRIBUTION, 449.

COPYRIGHT.

1. The term "dramatic composition" in the copyright acts includes all manner of compositions in which the story is represented by dialogue or action instead of narrative, and a scene or composition in which the author's ideas are conveyed by action alone, is within the term. *Daly v. Palmer*, 286.
2. Stage directions, and the order of representation of events in accordance therewith, are the subject of copyright. *Id.*
3. A dramatic scene or incident in which the ideas are expressed by action alone, or by action and dialogue combined, is within the acts. *Id.*
4. Where two dramatic scenes are substantially alike, and the charge of plagiarism is made in a bill by the author of one to restrain infringement of copyright, and not denied by defendant's answer, the validity of the copyright is not impaired by showing that the incidents of which the scene was composed were all known and in common use before the complainant's play was composed, and that a story had been previously published in which the incidents had been related in similar order. *Id.*
5. The representation of a part of a play is an infringement of copyright. *Id.*
6. The sale, with a view to public representation, of a play which infringes the copyright of another, makes the seller a participant in causing the play to be publicly represented, and an injunction will be granted against the sale. *Id.*

CORPORATION. See AGENT, 1.

1. The judgment of another state decreeing the dissolution of a corporation, will not prevent an action in this state begun prior to such dissolution from proceeding to judgment. *Hunt v. Columbia Ins., Co*, 183.
2. The directors of a corporation are its chosen representatives and constitute the corporation, to all purposes of dealing with others. *Maynard v. Fireman's Fund Ins. Co*, 186.
3. A corporation has the capacity to compose and publish a libel, and is liable to an action for damages therefor. *Id.*
4. Has no legal existence out of the boundaries of the sovereignty which created it, and unlike natural persons cannot change its domicile. *B. & O. Railroad Co. v. Glenn*, 247.
5. A deed, made by a corporation created by the laws of Virginia, must be determined by the laws of Virginia. *Id.*
6. In a suit to recover a dividend, declared "payable in dollars," evidence is inadmissible that the corporation received its earnings in property other than money. *Scott v. The Central Railroad & Banking Co. of Georgia*, 310.
7. Insolvency does not extinguish the legal existence of a corporation. *Parsons v. Eureka Powder Works*, 439.
8. An act of the legislature of California making each stockholder of a cor-

## CORPORATION.

poration liable for his share of all its debts contracted while he is a stockholder, is sufficient to answer the requirements of the Constitution. *Larabee v. Baldwin*, 503.

9. Insolvency and suspension of business being admitted, in answer to a bill praying for dissolution of corporation, no excuse is admissible for the forfeiture. *People v. Northern Railroad*, 631.

10. A corporation chartered to carry on a specified business in a city, is not exempt from liability to municipal regulations. *Frankford Passenger Railway v. Philadelphia*, 631.

11. A corporation chartered by one state, and accepting a charter from another, does not throw off its original obligation, nor shelter itself from any violation of duty to the first state. *Commonwealth of Penna. v. Pittsburgh and Connellsville Railroad*, 631.

12. Acceptance of second charter no ground of forfeiture of first. *Id.*

13. The Maryland Hospital has no power under its charter, to make a contract for the support of a lunatic, during life, in consideration of a certain sum of money. *Hospital v. Foreman*, 755.

14. Money paid on such a contract may be recovered back, less the cost of keeping the patient. *Id.*

COSTS. See BANKRUPTCY, XI.

COUPONS. See INTEREST, 3.

COURTS. See CONFEDERATE STATES, 1; CONSTITUTIONAL LAW, 15; INTERNATIONAL LAW, 1.

THE ENGLISH JUDICIAL SYSTEM, 65.

1. A state court of Georgia, during the late war, had no jurisdiction to decree partition of lands in that state while one of the joint owners was a citizen and resident in one of the other states adhering to the Union. *Cuyler v. Ferrill*, 100.

2. The United States courts, therefore, will take cognizance of a bill for partition of such lands and disregard the previous judgment. *Id.*

3. It is not essential that the jurisdiction of a superior court should affirmatively appear in the judgment roll; if it does not, and the contrary does not therein affirmatively appear, jurisdiction will be conclusively presumed. *Hahn v. Kelley & Morse*, 122.

4. Where the judgment recites the fact that the defendant has been duly served with process, it is a direct adjudication by the court upon the point, and is as conclusive on the parties as any other fact decided in the cause, provided it does not affirmatively appear from other portions of the record, consisting of the judgment-roll, that the recital is untrue. *Id.*

5. After a state court has made an order under the Act of Congress for the removal of a cause to a United States court, any further proceedings in the state court or in any other state court by appeal or other process, are void. *Akerly v. Vilas*, 229.

6. A state court making an order for the removal of a cause to a United States court, has no jurisdiction to allow an appeal from such order and to enjoin its clerk from certifying the record pending the appeal. *Id.*

7. Where the clerk refuses under such an order to certify the record to the United States court, the latter will, on motion, allow the record and proceedings to be supplied by copies or affidavits, and the cause to proceed as if the record had been duly certified. *Id.*

8. Where a court has given judgment which has been reversed by the Supreme Court of the state, and judgment entered in effect ordering a *venire de novo*, the cause has not reached final hearing or trial, and a motion to remove to a United States court is in time. *Id.*

9. Where special powers are given by statute to a court, all the requisites of the statute must be strictly complied with to render the proceedings valid. *Cockey v. Cole*, 248.

10. THE JUDICIAL SYSTEM OF SCOTLAND, 257.

11. The judgment of the Criminal Court of Baltimore on an appeal from the

**COURTS.**

commissioners for opening streets is final and conclusive. *Rundle v. Baltimore*, 313.

12. In legal contemplation the jurisdiction of the courts of Pennsylvania is foreign to the jurisdiction of those of Maryland. *Seever v. Clement*, 314.

13. At the common law the rule is well established, that the pendency of a prior suit *in personam* in a foreign court, between the same parties, for the same cause of action, is no sufficient cause for stay or bar of a suit instituted in one of our own courts. It is only the definitive judgment on the merits that will be considered conclusive. *Id.*

14. FORENSIC AND LEGISLATIVE DEBATE IN AMERICA AS COMPARED WITH ENGLAND AND FRANCE, 385.

15. The Act of February 28th 1839 providing for the transfer of cases from one circuit court to another is not repealed by the Act of March 3d 1863. *Supervisors v. Rogers*, 439.

16. A county court has the power within certain limits, to revise its judgments. *Smith v. Howard*, 507.

17. An order of an inferior state court under the Act of Congress for the removal of a cause to a United States court, is reviewable by the Supreme Court of the state, and an appeal to such Supreme Court suspends the vesting of jurisdiction of the case in the United States court until the determination of the appeal. *Akerly v. Vilas*, 558.

18. The Act of Congress provides for the removal of a cause *before trial* if an action at law, or *before final hearing* if a suit in equity, and after a judgment in the inferior court it is too late to remove the cause, although the judgment may be reversed by the Supreme Court of the state, and a new trial or hearing ordered. *Id.*

19. A state court has no jurisdiction to grant a mandamus, to compel a judge of a district court, to try an action which has been transferred to the Circuit Court of the United States. *Francisco v. Manhattan Ins. Co.*, 698.

20. THE JUDICIAL SYSTEM OF FRANCE, 705.

**COVENANT.** See LANDLORD AND TENANT, 11; VENDOR AND PURCHASER, 19; WARRANTY.

**CRIMINAL LAW.** See EVIDENCE, 6; WITNESS, 2.

**I. In general.**

1. The statement of a prisoner accused of robbery, that he buried the money in a certain place, admissible in evidence against him, though not voluntarily made. *People v. Hoy*, 183.

2. Where the jury return a verdict of guilty of "involuntary manslaughter," a motion in arrest of judgment on the ground of there being two grades of "involuntary manslaughter," should be sustained. *Thomas v. State*, 310.

3. Where a statute authorizes but does not compel a party indicted to become a witness in his own behalf, it is improper for the prosecution to comment to the jury on the prisoner's refusal to offer himself as a witness, and the court should when requested charge that no inference was to be drawn against the prisoner from his refusal. *People v. Tyler*, 430.

4. An accomplice who has given testimony criminating himself as well as his co-defendant, on whose trial he testifies, cannot refuse to answer fully on cross-examination concerning the entire transaction of which he has undertaken to give an account, and in which he had shown himself guilty. *Foster v. People*, 494.

5. No consequences follow a conviction of felony, except such as are declared by statute. *Estate of Nerac*, 506.

6. It is sufficient if the words used by the defendant, are set out in an indictment for false pretences. *State v. Call*, 570.

7. Maliciously disturbing a meeting of school directors is indictable at common law. *Campbell v. Commonwealth*, 736.

**II. Burglary.**

8. On the trial of an indictment for burglary, parol proof of possession of the premises under a written lease is sufficient. *Houston v. State*, 311.

## CRIMINAL LAW.

9. Where the defendant was acquitted of an assault with intent to murder, and afterwards indicted for the same act, under the charge of an assault of an "aggravated nature," the plea of *autrefois acquit*, held good. *Holt v. State*, 311.

III. *Gambling*.

10. Evidence that defendant was at a card table, with a faro box and cards in his hands, warrants a conviction for gambling. *Missouri v. Andrews*, 379.

CURTESY. See HUSBAND AND WIFE, II.

DAM. See CONSTITUTIONAL LAW, 2.

DAMAGES. See TRESPASS, 7-8.

1. A verdict for substantial damages, for barring a minister out of his church on a Sunday, should not be disturbed. *Lynd v. Menzies*, 94.

2. In an action for causing wrongful death, funeral expenses are not recoverable as damages. *Gay v. Winter*, 183.

3. The measure of damages in an action for diverting a stream, is the depreciation in the value of plaintiff's premises. *Easterbrook v. Erie Railroad Co.*, 188.

4. The damages ordinarily recoverable for breach of contract, are those necessarily following the breach. *Coal Co. v. Foster*, 368.

5. The failure of an engine builder to furnish at a fixed time, according to contract, to a coal company a suitable engine for transporting their coal, entitles them to damages for their expenses in such transportation, with the means they had, or the best they could procure during the period of delay, beyond what they would have incurred with the engine. *Id.*

6. But they cannot claim also for the profits in the transportation by engine of the extra quantity of coal they might have transported by it in the same period. *Id.*

7. The value of the property destroyed, is the measure of damages in an action against an agent for not procuring full insurance. *Beardesley v. Davis*, 379.

8. Exemplary are only to be given in case of fraud, malice, gross negligence, or oppression. *Cram v. Hadley*, 439.

9. For breach of contract to make lumber, is the difference between the cost of making and contract price. *Hale v. Trout*, 503.

10. Rule for, on breach of contract to sell real estate, is the difference between contract price and the value of the premises. *Pringle v. Spaulding*, 570.

DEBT. See CONFLICT OF LAWS.

DEBTOR AND CREDITOR. See DECEDENT'S ESTATE, 1; EQUITY, 1, FRAUD, 5; INTERNATIONAL LAW, 10.

I. *Sale or Conveyance fraudulent as to Creditors*.

1. A conveyance made in consideration of the grantees assuming the mortgages on the property, void as to creditors, to the extent of the value of the property above the mortgages. *Mead v. Combs*, 120.

2. A judgment-creditor purchasing at sheriff's sale, under his judgment, is entitled to have a mortgage upon the property, given by the defendant in execution in embarrassed circumstances, set aside and declared void. *King v. Storey*, 120.

3. By the Act of March 7th 1850 to prevent fraudulent trusts and assignments, a creditor upon a return of an execution *nulla bona*, has a lien upon the choses in action of his debtor. *Green v. Tatum*, 120.

4. The sale of a railroad with its franchises and rolling-stock, under a decree of foreclosure, for a price far below its value, will be set aside as a fraud on creditors. *Drury v. Cross*, 248.

5. Subsequent creditors of a grantor cannot attack a conveyance valid when made. *Baker v. Gelman*, 311.

6. A creditor who trusts his debtor after being informed that the latter has conveyed away his property, cannot impeach such conveyance as fraudulent. *Id.*

**DEBTOR AND CREDITOR.**

7. A creditor who attaches and sells his debtor's goods, cannot prove his claim under an assignment. *Valentine v. Decker*, 378.

8. To render a sale void as to creditors, the vendee as well as the vendor must participate in the intent to delay. *Leach v. Francis*, 504.

**II. Insolvency of Debtor.**

9. State insolvent laws have no extra-territorial operation: and a creditor cannot be compelled by a state of which he is not a citizen or resident to become a party to insolvent proceedings therein; and such proceedings cannot discharge a debt due to a non-resident creditor, unless he voluntarily submits to the jurisdiction by becoming a party to the proceedings, or claiming a dividend thereunder. *Hawley v. Hunt*, 546.

10. A non-resident and non-assenting creditor is not bound by a debtor's discharge under state insolvent laws, no matter where the debt originated, or is made payable: *citizenship* of the parties governs, and not the *place* where the contract was made or where it is to be performed. *Id.*

11. The history of the Federal and state adjudications on the subject of the effect of discharges under state insolvent laws, examined by DILLON, C. J. *Id.*

12. An express promise by a debtor, after his discharge under the insolvent laws, to pay a prior debt, waives the discharge. *Knight v. House*, 695.

**III. Tender and Payment.**

13. A creditor's agreement to receive the note of a third person, in payment of his claim, with actual transfer, extinguishes the claim. *Roberts v. Fisher*, 638.

14. A debtor has the right in the first instance to make the appropriation of payment. *Neidig, Adm. of Neidig, v. Whiteford*, 695.

**DECEDENT'S ESTATE.** See EXECUTOR AND ADMINISTRATOR, 6.

1. A creditor of a decedent cannot be prejudiced by the failure of the commissioners of the Probate Court to present his claim for allowance. *Dickey v. Corliss*, 504.

2. Probate Court has no jurisdiction over trustee appointed by will. *Hayes v. Hayes*, 575.

**DEED.** See CORPORATION, 5; TRUST AND TRUSTEE, 1.

1. A deed altered by consent of the parties and redelivered by them is good. *Bassett v. Bassett*, 183.

2. The omission to read a deed to an illiterate marksman renders the acknowledgement of no value. *Suffern v. Butler*, 183.

3. Conveying premises, "subject to a mortgage executed by the parties of the first part in the year 1856," sufficiently describes the mortgage. *Johnson v. Zink*, 439.

**DITCH.** See WATERS AND WATERCOURSES, 2-3.**DIVIDEND.** See CORPORATION, 6; TENANT FOR LIFE, 2.**DIVORCE.** See HUSBAND AND WIFE, I.**DOLLARS.** See CONTRACT, 6-7.**DOWER.** See HUSBAND AND WIFE, II.**EASEMENT.**

1. A minister of the Protestant Episcopal Church has either the possession of the church edifice or a right in the nature of an easement to enter therein, on all occasions set apart in the parish for divine services, and a substantial interference with such right will lay the ground for an action at law. *Lynd v. Menzies*, 94.

2. The English ecclesiastical law forms the basis of the law regulating the affairs of this denomination of Christians. *Id.*

3. In order to vest the pastor with the ordinary rights in the temporalities pertaining to his office it is not necessary for the congregation to be incorporated nor that the title to the church should be lodged in such congregation. *Id.*

**EASEMENT.**

4. An easement will not be extinguished by mere non-user for twenty years. *Veghte v. The Raritan Water Power Co.*, 191.

5. Twenty years adverse enjoyment of a right to flow back water upon another's land, will constitute an easement, which no interruption, except for the same period, or a plain intention to abandon, will destroy. *Carlisle v. Cooper*, 249.

**ELECTION.**

1. Where at an election for sheriff a majority of the votes are cast for a disqualified person, the next in vote is not to be returned as elected. *Commonwealth ex rel. McLaughlin v. Cluley*, 63.

2. Election returns should not be rejected where there is some irregularity in the appointment of the officers of the election, unless injurious results accrued therefrom. *Keller v. Chapman*, 185.

3. It is error in a county court to count votes not in fact received, even though they were improperly rejected. *Webster v. Byrnes*, 185.

**EJECTMENT.**

1. Parties in possession under the defendant in an action of ejectment, may be dispossessed by a writ of restitution. *Mayne v. Jones*, 120.

2. Possession accompanied by a claim of the fee, will sustain an ejectment against one showing only naked possession. *Dall v. Faiver*, 379.

3. A judgment in ejectment for plaintiff, does not preclude the defendant from asserting a title subsequently acquired. *Mann v. Rogers*, 505.

4. The right to set off the value of improvements, against a claim for damages in ejectment, depends upon their permanency. *Carpentier v. Small*, 505.

5. To maintain, must be disseisin of plaintiff, and wrongful possession by defendant. *Chamberlin v. Donahue*, 632.

6. Vendor cannot eject his own vendee who has entered by license, or under express agreement giving him possession, until the license is rescinded or the agreement broken. *Pierce v. Tuttle*, 633.

7. *Prima facie* all who came into possession pending the action of ejectment, must go out, if the plaintiff recover. *Wetherbee v. Dunn*, 696.

**ENTRY.** See MORTGAGE, 1.**EQUITABLE ELECTION.** See WILL, 4-5-7.**EQUITY.** See TRADE-MARK, 2.

1. A creditor cannot file a bill to set aside a transfer of property fraudulently made by his debtor, 'until he has a judgment or execution, such as would give a lien on that property if not transferred. *Green v. Tatum*, 120.

2. A complainant cannot dismiss his own bill as to part of the relief prayed, and proceed with the residue; he must apply to amend. *The Camden and Amboy Railroad Co. v. Stewart*, 121.

3. A court of equity will not relieve against a conveyance made to prevent the grantor's property from being sacrificed and his creditors from recovering their money. *Eyre v. Eyre*, 121.

4. In a suit to set aside a conveyance to a trustee to hold in trust for one person for her life, and at her death to such of her children as she may appoint, such children as the *cestui que trust* may have are not necessary parties; their interest is too uncertain and contingent. *Booraem v. Wells*, 121.

5. An injunction will be dissolved upon the answer only when it denies explicitly the facts upon which the equity of the bill is founded. *Teasey v. Baker*, 122.

6. Injunction will issue to prevent the cutting down of fruit trees, shade trees, or ornamental shrubbery, by tenant for life. *Tainter v. Mayor of Morristown*, 127.

7. A bill in the nature of a bill *quia timet*, will not lie by heirs at law in anticipation of the trusts under a will becoming incapable of execution. *Girard v. Philadelphia*, 245.

**EQUITY.**

8. Every intendment will be made to support a sale made under the decree of a court of equity, unless the price is so grossly inadequate, as to injure parties not in default. *Farmers' Bank of Maryland v. Clarke*, 250.

9. A bill, charging that a creditor cannot obtain a settlement of his claim twelve months after an assignment, is not demurrable. *Dobbins v. Porter*, 309.

10. Will not set aside an agreement intended to defraud third parties, as between the parties themselves. *Sweet v. Tinslar*, 438.

11. Will relieve against contracts made in mutual mistake. *Watts v. Cummins*, 696.

12. When a party asks a chancellor to restrain the inequitable use of a legal title, he must show such facts as entitle him to rescind on the ground of either mistake or fraud. *Id.*

13. If defendant in chancery suit is sought to be made a party in his own right and as executor, bill should state the fact, and pray process against him in both characters. *Carter v. Ingraham*, 697.

14. An action for the specific performance of a trust by the execution of a deed, may be maintained without a demand of the deed. *Jones v. City of Petaluma*, 697.

**ERRORS AND APPEALS.** See **COURTS**, 11; **TAXATION**, 5.

An appeal or writ of error which does not bring to the Supreme Court a transcript of the record before the expiration of the term to which it is returnable, is no longer a valid appeal or writ. *Edmonson v. Bloomshire*, 255.

**ESTOPPEL.**

1. A party claiming an estoppel must show that he has relied on some act or incurred some liability, which would make it a fraud upon him to have the truth shown. *Genlinghouse v. Whitwell*, 60.

2. The plaintiff in an action for malicious prosecution, is not estopped from showing want of probable cause, because he paid part of the sum claimed in the original cause. *Morton v. Young*, 187.

3. A judgment, to operate as an estoppel, must be upon the same subject-matter and between the same parties. *McKenzie v. B. and O. Railroad Co.*, 251.

4. Is never to be applied, except where to allow the truth to be told would consummate a wrong. *Franklin v. Merida*, 506.

5. The owner of goods representing them as belonging to another, is estopped on an attachment from showing that the representation was false. *Horn v. Cole*, 570.

6. A woman will be estopped from claiming dower, in land she encouraged another to purchase, by stating she had no claim thereon. *Malony v. Horan*, 571.

7. Whenever an act is done or a statement made by a party which cannot be contradicted or contravened without fraud on his part and injury to others whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what would otherwise be mere evidence. *The State v. Pepper*, 665.

8. A surety signing and delivering to the principal obligor for delivery to the obligee a bond, before the names of the sureties have been inserted in the body of the instrument, will be held as agreeing that the blank for such names may be filled after he has executed it. *Id.*

9. A surety signed a sheriff's official bond after the signatures of other sureties, without reading it, or hearing it read, or asking what it was, on being told by the principal that it was a county paper and requested by him to sign it. *Held*, that such surety was not released by the fact that one of the signatures before his was forged. *Id.*

10. The judgment of a court of competent jurisdiction, is an estoppel as to all matters put in issue by the pleadings. *Jackson v. Lodge*, 697.

11. One led by silence ignorantly and innocently to rest on his title, believing it secure, and to expend money and make improvements, without timely warning, will be protected by estoppel. *Chapman v. Chapman*, 756.



**EVIDENCE.** See CORPORATION, 6; CRIMINAL LAW, 1; FRAUD, 2; TRESPASS, 8-9; WITNESS, 7.

1. If the presiding judge is satisfied, upon inspection, of the genuineness of a signature to an instrument, it is sufficient *prima facie*, without other proof. *Brown v. Lincoln*, 61.

2. Corporation books do not prove themselves: proof of their true character must be given to authorize their reception in evidence. *Coal Co. v. Foster*, 368.

3. At the time of offering evidence some competent purpose should be stated as the ground for its reception, if it be not obviously competent on its face. *Id.*

4. Of similar accidents, is not admissible in an action against an overseer of highways, for an injury resulting from breaks in the road. *Sherman v. Kortright*, 382.

5. The proper time to object to the introduction of testimony for incompetency is when such testimony is offered in evidence at the trial. *Sweeney v. Mathews*, 440.

6. Evidence that a person charged with larceny had previously attempted to purchase a chattel similar to that stolen, has no tendency to disprove theft, and is not admissible for that purpose. *Foster v. People*, 494.

7. The declaration of a deceased person as to boundaries, though made off the land, is admissible in evidence. *Towers v. Silsby*, 502.

8. The slightest circumstances tending to show malice are admissible, where punitive damages are claimed. *Lyon v. Hancock*, 503.

9. County recorders' books, admissible in evidence to prove the claim of a miner. *Pralus v. Pacific Mining Co.*, 508.

10. The official character of persons acting as mustering officers, is *prima facie* to be assumed. *Chapman Township v. Herrold*, 633.

11. Certificates from the War Department of the mustering in of recruits are in no sense records importing absolute verity. *Id.*

12. The opinion of an expert must be predicated on facts proved or admitted, or such as appear in evidence hypothetically stated. *Rouck v. Zehring*, 697.

13. Declarations of an obligor shortly after the execution of a note, that he had not signed it are admissible, not as evidence that he had not signed, but to show want of memory and understanding about what he had done. *Id.*

14. Receipts, when mere acknowledgments of delivery or payment, are but *prima facie* evidence of the facts, and not conclusive: the facts may be contradicted by oral testimony. *Batdorf v. Albert*, 697.

15. Of a general and well known usage among the banks of a city is admissible in an action against one of the banks. *Chesapeake Bank v. Swain*, 754

**EXECUTION.** See PARTNERSHIP, 6-9; SET-OFF, 3; TRUST AND TRUSTEE, 2.

1. An attachment or levy on the property of a debtor unlawfully arrested, is void. *Clossom v. Morrison*, 60.

2. Money or other articles of value with which a prisoner might obtain the means of effecting his escape, are subject to levy or attachment. *Id.*

3. It is a question in such cases for the jury, whether the officer making the arrest acted in good faith or not. *Id.*

4. A lace shawl is wearing apparel and exempt from execution, but rings and jewelry are liable for debt. *Frazier and Wife v. Barnum*, 248.

5. In an action against a sheriff for a false return of *nulla bona*, he will not be liable unless the goods pointed out to him really belonged to the defendant, and he has the right to demand that the sureties in the indemnity bond reside in his county. *Commonwealth ex rel. Hood v. Vandyke*, 317.

6. *Prima facie* all property is liable to execution, a claim of exemption will not therefore avail an officer sued for neglect of duty in not levying. *Baker v. Brintnall*, 380.

7. Levy upon property supposed to belong to the maker of a note, is no satisfaction of the judgment, and no defence to an action against the endorsee. *Rice v. Groff*, 634.

**EXECUTORS AND ADMINISTRATORS.** See **WILL**, 1; **WITNESS**, 8;

1. The public administrator of the city of San Francisco only acts by virtue of a special grant from the Probate Court for each particular estate. *Matter of the estate of Hamilton*, 126.
2. While one administrator is in office, the probate judge or court cannot appoint a new one. *Id.*
3. An executor has no power to sell the lands of his testator, unless directed to do so by the will, either expressly or by implication. *Lippincott's Executor v. Lippincott*, 127.
4. The capacity of an administrator to sue in *assumpsit* can only be raised by a plea in abatement. *Brown's Adm. v. Nourse*, 185.
5. Where an executor is also trustee, he may be superseded as such but allowed to continue as executor. *Leddel's Executor v. Starr*, 185.
6. If a suit is prematurely brought the executor must plead the fact in abatement and not in bar. *Amoskeag Manufacturing Co. v. Barnes*, 440.
7. May charge decedent's estate for suitable headstones for grave, where there are sufficient assets. *Ferrier v. Myrick*, 635.
8. An executor is not liable *de bonis propriis* on an oral promise to pay a legacy. *Okeason's Appeal*, 698.
9. Guilty of a *devastavit* for failure to collect the debts of the estate. *Oglesby v. Howard*, 698.

**FIXTURES.**

1. Trade fixtures and buildings for trade, no matter how strongly attached to the soil or firmly embedded in it, are treated as personal property, and as such subject to removal by the person erecting them. *Northern Central Railway Co. v. Canton Co.*, 540.
2. The road-bed of a railway, the rails fastened to it, and the buildings at the depots are real property; but under certain circumstances they may be trade fixtures, and be treated as personal property. *Id.*
3. The ground upon which a tenant's right to remove his fixtures has been limited during the continuance of his term, rests upon the doctrine, that if he neglected to avail himself of his right within this period, the law presumed that he voluntarily relinquished his claim in favor of the landlord. This presumption cannot arise, where the term, being uncertain in its continuance, may be terminated suddenly, and without previous notice. *Id.*

**FRAUD.** See **PARTNERSHIP**, 8; **VENDOR AND PURCHASER**, 2-12.

1. One who participates in the fruits of a fraud, is equally liable with the party originally committing it. *Lincoln v. Clafin*, 250.
2. The declarations of each are evidence against the other, though made in their absence. *Id.*
3. Interest is not allowable as a matter of law in torts. *Id.*
4. A payment in Confederate notes, after the surrender of the Confederate armies, to one ignorant of the fact, is a fraud upon him. *Blalock v. Phillips*, 312.
5. A conveyance intended to delay a creditor even temporarily is void. *Sweet v. Tindlar*, 442.
6. Where two persons are engaged in defrauding third parties, equity will not relieve either, as against the other, from the consequences of his misconduct. *Stewart v. Ackley*, 442.

**FRAUDS, STATUTE OF.**

1. Part performance will take a contract out of the Statute of Frauds, when it has been in part performed in such manner that a refusal would be a fraud on the other party. *Eyre v. Eyre*, 119.
2. Where a verbal contract is to be performed within a year by one party, but not by the other, the question whether the Statute of Frauds applies or not depends on whether the suit is brought against the party who was to perform his part within the year. If it is so brought, the statute would not apply, but if brought against the party whose agreement was not to be performed within the year, then the statute would be a bar. *Sheehy v. Adarene*, 326.

**FRAUDS, STATUTE OF.** See **HUSBAND AND WIFE**, 3.

1. An agreement to sell hop roots in the ground, is not within the statute as being an interest in real estate. *Webster v. Ziely*, 441.

2. A subsequent written recognition of a contract void by the Statute of Frauds is not only a ratification of it, but is a sufficient note or memorandum of the contract within the statute. *Id.*

3. Whether a contract is within the statute, depends upon whether it is essentially for the sale of goods, or for the skill and labor of a workman expended upon them. *Pitkin v. Noyes*, 572.

4. The delivery and acceptance of part of the wood the first winter, on a contract of sale of certain cords of wood, the vendor to deliver as much as he could one year, and the balance the next, will take the case out of the statute. *Gault v. Brown*, 572.

5. The authority of an agent contracting for the sale of land need not be in writing. *Pringle v. Spaulding*, 572.

6. An agreement for the sale of land, to be valid, must be binding on all the parties by whom made. *Snyder v. Neefus*, 572.

7. The owner who conveys must be bound by writing, but the other party for anything contained in the statute need not so be bound. *Johnston v. Cowan*, 755.

**GOLD.** See **COIN**.**GUARDIAN.**

Converting stock belonging to his ward's estate, is liable for the highest price the stock attains after conversion. *Lamb's Appeal*, 635.

**GUARANTY.** See **BILLS AND NOTES**, 4.

The liability of guarantor for rent in arrear can only be discharged by payment, release, or other satisfaction. *Kingsbury v. Williams*, 635.

**HIGHWAY.** See **CONSTITUTIONAL LAW**, 8; **EVIDENCE**, 4; **RAILROAD**, 13; **TOWN**, 2.

1. Distinction between highway laws of Vermont and Massachusetts. *Morse v. Town of Richmond*, 81.

2. Time will not legalize an encroachment upon a public highway. *Tainter v. Morristown*, 121.

3. Petition for, dismissed where the same had been personated within two years previous, and rejected. *Whitcher v. Town of Landaff*, 573.

4. Objections to form of petition for highway, must be taken before reference to county commissioners. *Wensworth v. Town of Farmington*, 573.

**HUSBAND AND WIFE.****I. Marriage and Divorce.** See **ALIEN**, 2, 3.

1. Divorce on the ground of adultery will not be decreed upon the uncorroborated testimony of a *particeps criminis*, herself unchaste and untruthful. *Clare v. Clare*, 122.

2. Father not responsible for education of his child, born after decree of divorce. *Harris v. Harris*, 573.

3. Parol promise of husband, during coverture, to pay ante-nuptial debt of wife, is within the Statute of Frauds and cannot be enforced. *Cole v. Skurtleff*, 636.

4. Liability of husband for ante-nuptial debts of wife, terminates on wife's death, unless enforced during coverture. *Id.*

**II. Curtesy, Dower.** See **ESTOPPEL**, 6.

5. The erection of buildings by the husband on the leasehold lands of his wife will not take away her right of survivorship. *Riley's Administrator v. Riley*, 186.

6. The legal effect of wife's joining in deed of conveyance of land of husband, is to release her dower. *Maloney v. Horan*, 573.

7. A wife taking conveyance of land, in which she was entitled to dower, merges it. *Id.*

**III. Separate Estate of Wife and Estate by Entireties.**

8. Where A. makes a parol gift of land to B. and wife as long as they live,

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and the latter move on the land with the assistance of A., pay part of the taxes, make valuable improvements and continue to reside on it for six years, the gift will be treated in equity as in the nature of a contract executed, and A. will not be allowed to recover possession of the land during the life of B. or his wife. *Freeman v. Freeman*, 29.

9. If B. should abandon the land and either directly or by neglecting to appear and defend, connive with A. to eject the wife, the latter will nevertheless be entitled to a judgment in her favor for her own life. *Id.*

10. A husband's appropriation of money belonging to his wife's separate estate, does not make them debtor and creditor, even when done with the wife's consent. *Kuhn v. Stansfield*, 312.

11. A conveyance to husband and wife and their heirs prior to 1850, constituted in Kentucky, as at common law, an estate by entireties, which neither husband nor wife could sever or make liable for debts as against the other. *Elliott v. Nichols*, 433.

12. The statute of 1850, abolishing the right of survivorship and turning the estate into a tenancy in common, is not retrospective. *Id.*

13. The husband and wife cannot enter into a mortgage of her statutory separate estate for the purpose of subjecting it to sale for the payment of the husband's debts; and if they do, a court of chancery will not permit the mortgage to be enforced by sale of the wife's separate estate, if she objects to it. *Bibb v. Pope*, 490.

**IV. Actions by and against Husband and Wife.** See **SPECIFIC PERFORMANCE**, 2.

14. Since the acts of the legislature of New York of 1860, chap. 90, and of 1862, chap. 172, a married woman may bring an action in her own name against a wrong-doer, for a wrong committed upon her person, without joining her husband with her as a party. *Ball v. Bullard*, 381.

**INFANT.** See **PARENT AND CHILD**, 3; **REVERSION AND REMAINDER**.

1. May recover for an injury caused partly by his own imprudent act, but the father cannot. *Glassey v. Hestonville Railway Co.*, 315.

2. To a child of tender years no contributory negligence can be imputed. *North Penna. Railroad v. Mahony*, 315.

3. The contracts of infants are:—

(1). Binding—when for necessities at fair rates;

(2). Void—when manifestly and necessarily prejudicial; and

(3). Voidable, at the infants' election, either during minority or within a reasonable time after attaining majority: including all executory agreements not for necessities, and all executed contracts of this sort wherein the other party can be placed substantially in *statu quo*. *Robinson v. Weeks*, 554.

4. May recover for what he has done in execution of a voidable contract, by restoring what he received under it. *Heath v. Stevens*, 574.

**INJUNCTION.** See **EQUITY**, 5-6; **NUISANCE**, 2; **TRADE-MARK**, 5; **WASTE**.

**INNKEEPER.**

A guest is not relieved from all responsibility in respect to his goods on entering an inn. He is bound to use reasonable care and prudence in respect to their safety, so as not to expose them to unnecessary danger of loss. *Read v. Amidon*, 507.

**INSOLVENT.** See **BANKRUPTCY**, 1; **DEBTOR AND CREDITOR**, II.

**INSURANCE.** See **DAMAGES**, 7; **PARTNERSHIP**, 16.

1. The words "totally disabled from the prosecution of his usual employment," in an accident insurance policy, mean *wholly disabled from doing substantially all kinds of his accustomed labor, to some extent*. A disability that prevents his doing as much in a day's work as before is not total, but one that entirely prevents his doing certain portions of his accustomed work is total, though there are other portions that he is able to do. *Sawyer v. U. S. Casualty Co.*, 233.

2. Making brooms by hand, does not come within the prohibition "mills

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and manufactories," in a policy of insurance. *Franklin Ins. Co v. Brock*, 312.

3. A premium above the usual rate, is some evidence that a more than usual risk was assumed. *Id.* 313.

4. Each policy is a distinct contract. *Id.*

5. An "accident" within the meaning of a policy of insurance means an event which happens from some external violence or *vis major*, and which is unexpected, because it is from an unknown cause, or is an unusual result of a known cause. *Schneider v. Life Ins. Co.*, 349.

6. Negligence of the person injured does not prevent it from being an accident. *Id.*

7. Therefore in an action on a policy of insurance against accident, the negligence of the insured is no defence. *Id.*

8. A policy of insurance against accident contained a clause against liability for injury resulting from the assured "wilfully and wantonly exposing himself to any unnecessary danger." The assured attempted to get on a train of cars while in slow motion, and fell and was killed. *Held*, that the negligence was not wilful or wanton, and the company were liable. *Id.*

9. Under an agreement to insure generally, an agent should obtain full insurance if possible. *Beardesley v. Davis*, 378.

10. The assignee, of a payee who had an insurable interest, is entitled to recover for a loss. *Franklin v. National Ins. Co.*, 380.

11. A temporary insurance, effected without notice to the original insurer, but not existing at the time of the loss, will not invalidate the policy. *Obermeyer v. Globe Ins. Co.*, 380.

12. The maxim of "*causa proxima non remota spectatur*," applied in insurance cases. *Insurance Co. v. Tweed*, 442.

13. Insurance effected in the name of one of two owners of goods, upon the representation of an agent that such is correct, may be recovered in case of loss, by a suit in the name of the party to whom the policy is issued. *Manhattan Ins. Co. v. Webster*, 757.

**INTEREST.** See FRAUD, 3; INTERNATIONAL LAW, 10.

1. Agreement to call at obligor's office for interest on bond and mortgage, does not make the office the only legal place for payment. *McCotter v. De Groot*, 125.

2. Equity will relieve obligor against breach of condition in consequence of such agreement. *Id.*

3. Interest warrants or coupons in a negotiable form, draw interest after payment of them is unjustly neglected or refused. *Aurora v. West*, 250.

**INTERNAL REVENUE.**

A written protest signed by the party, is a condition precedent to the right to sue for the recovery of duties paid under the Act of February 26th 1845. *Nichols v. United States*, 255.

**INTERNATIONAL LAW.** See PRIZE.

1. An officer commanding troops of the United States in an insurgent state, during the late civil war, seized property of a citizen of the state, and after acquiring firm possession, sold it to a third person. After the war the owner at the time of the seizure brought an action of trover for the value of the cotton against the purchaser, in the Circuit Court of the United States. *Held*, that the Court had no jurisdiction, the seizure was made as an act of war, and its validity was not triable in a municipal court, in a common-law proceeding. *Coolidge v. Guthrie*, 22.

2. That this defence was admissible under the general issue in trover. *Id.*

3. That after complete possession of the cotton by the captor for twenty-four hours it became *booty* by the laws of war, and the title of the hostile owner was completely extinct. If the plaintiff in this case had any right it was against the United States. *Id.*

4. All species of contracts or commercial intercourse, whether direct or indirect, between subjects of different powers at war, are invalid. *Billgery v. Branch*, 334.

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5. The late contest between the United States and the Confederate States was a war. *Bilgery v. Branch*, 334.

6. The government of the Confederate States being a government *de facto* only, had jurisdiction and gave national character only to such parts of the territory of the several states as were under its actual control. *Id.*

7. While therefore the city of New Orleans was under the authority of the Confederacy, its citizens were citizens of the Confederacy and enemies of the United States; but when the city passed into the hands of the Federal forces, it became again part of the United States, and its citizens became enemies to the Confederate States. *Id.*

8. Where a citizen of Richmond drew a draft upon a citizen of New Orleans in 1862, after the capture of the latter city by the United States forces, and the payee, in February 1863, endorsed the draft to another, a citizen of Vicksburg, within the Confederate States, who held it until October 1863, and then presented it to drawee, at New Orleans, who refused payment, and the draft was then protested: *Held*, that this was an illegal act, and the holder could not recover. *Id.*

9. This is so whether the contract be held void under the general rules of international law or under the Act of Congress of July 13th 1861. *Id.*

10. Where the debtor and the creditor's known agent to receive the money, reside in the same jurisdiction, the fact that the creditor is a citizen of a power at war with the debtor's government, and resident in the hostile state, does not absolve the debtor from his obligation to pay, and if he does not, he is liable for interest. *Ward v. Smith*. 354.

11. When the United States forces, during the late war, acquired firm occupation of part of an insurrectionary state, the citizens of that part occupied were restored to their relations as citizens of the United States, and contracts between them and other citizens became valid. *Graham v. Merrill*, 477.

12. The Act of July 13th 1861, and the Proclamation of the President of August 16th 1861, authorized, 1. Unrestricted commercial intercourse between the citizens of loyal states and of those parts of insurgent states in occupation of the Federal forces; and 2. Intercourse between citizens of the loyal and insurgent states, subject to the license of the President and the regulations prescribed by the Secretary of the Treasury; and the President's order of February 28th 1862 was a general license to such intercourse. But by the President's Proclamation of March 31st 1863, the distinction was abolished, and all intercourse between the citizens of loyal and insurgent states was made subject to license by the President and the regulations of the Secretary of the Treasury. *Id.*

13. It was not necessary to the lawfulness of such intercourse that the party engaging in it should have a special license to himself by name under the President's own sign manual. The President's power to license might be delegated or might be exercised by a general proclamation, such as those of February 28th 1862 and March 31st 1863. *Id.*

14. The late rebellion was such a war as suspended the right of a citizen of Mississippi to sue on a policy of insurance in a Connecticut company. *Semmes v. Ins. Co.* 673.

15. In addition to this consequence of a state of war, the right to sue on such a policy was suspended by the Proclamation of the President, of August 16th 1861. *Id.*

16. Where a policy contained an express provision that in any action under it commenced more than a year from the time of loss, the lapse of time should be *conclusive evidence* against the validity of the claim, the period of the war must be omitted in computing the year. *Id.*

17. The condition of war existed as regards the state of Mississippi, at least from 16th August 1861, when the President, in pursuance of the Act of Congress of July 13th 1861, declared that state in insurrection. Whether the war commenced, in contemplation of law, before that date, not decided. *Id.*

18. The legal period of the termination of the war depends not on the continuance or cessation of active hostilities, but on the acts of the departments

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of the government to which political powers are intrusted. The Proclamation of the President of June 13th 1865, removing the restrictions on trade as to the states theretofore in insurrection, was a valid act of recognition by the executive department of the government of the termination of the war, and the right of plaintiff in this action, to sue, revived from that date. *Semmes v. Ins. Co.*, 673.

**JOINT LIABILITY.** See **PARTNERSHIP**, 13.

One who previously assents to the commission of an act is jointly liable with the one committing it. *Treat v. Reilly*, 505.

**JUDGE.** See **CONFEDERATE STATES**, 4.**JUDGMENT.** See **COURTS**, 16; **ESTOPPEL**, 3-10.

1. The judgment of a court of superior jurisdiction may be collaterally attacked upon the ground that the court by which it was rendered had no jurisdiction, either of the subject matter or of the person of the defendant, or both. *Hahn v. Kelly and Morse*, 122.

2. Such facts must appear affirmatively on the record. *Id.*

3. May be taken to secure future advances when such is a constituent part of the original agreement. *Neidig, Adm. of Neidig, v. Whiteford*, 695.

**JUSTICE OF THE PEACE.**

1. Omission by a justice to keep a docket will not render his judgment void. *Baker v. Brintnall*, 380.

2. Non-residence must be pleaded to avoid the jurisdiction of a justice. *Osborne v. Gilbert*, 381.

**LANDLORD AND TENANT.** See **FIXTURES**, 3; **NUISANCE**, 4.

1. Where the owner of land leased, is to receive part of the produce, instead of rent, the lessor and lessee become tenants in common of the crops. *Brown v. Lincoln*, 61.

2. A tenant's remedy against his landlord, for abandoning his first distress without cause, and levying a second, is trespass, case or trover. *Everett, Adm., v. Neff*, 251.

3. The lease of land for a term of years, with the exclusive right to bore for and collect oil, passes a corporeal interest. *Chicago Oil Co. v. United States Co.*, 314.

4. A person is not liable for the negligent act of his tenants, in throwing coal-dirt into a river, unless done by his authority or command. *Little Schuylkill Nav. Co. v. Richards*, 315.

5. Where tenant agrees to pay the rent in "certain specified repairs on the house," and is expelled before the lease expires, he may recover the value of the repairs, if they exceed the rent, in assumpsit. *Smith v. Newcastle*, 443.

6. Tenant at will entitled to the manure. *Corey v. Bishop*, 443.

7. A tenant is confined to the remedies specified in his lease, and a covenant that the landlord will repair is not to be implied. *Sheets v. Selden*, 443.

8. Tenant cannot set up want of repairs, on a bill, to enjoin a writ of possession issued by landlord. *Id.*

9. An injury caused to demised premises by a storm, is to be regarded as an act of God. *Polack v. Pioche*, 501.

10. A tenant cannot dispute his landlord's title before surrendering possession. *Tewksbury v. Magrath*, 506.

11. A general covenant of the tenant to repair the demised premises is binding upon the tenant under all circumstances, even if the injury proceeds from the act of God, from the elements, or from the act of a stranger. *Polack v. Pioche*, 508.

12. Tenant not entitled to remove manure from farm, at the expiration of lease, though more there than when he came. *Hill v. De Rochemont*, 574.

**LEGACY.** See **WILL**, 5.

1. Where the real and personal estate of the testator have been blended in one common fund, and the personalty is insufficient to pay debts, and the words "not herein otherwise disposed of" are added to the residuary clause, legacies will be charged upon the real estate. *Dey v. Dey's Adm.*, 127.

**LEGACY.**

2. In determining whether a legacy is chargeable upon the real estate, the court will consider the circumstances of the testator, and the nature and amount of his property. *Day v. Day's Admr.*, 127.

**LEGAL TENDER NOTES.** See COIN, 5.

1. **LEGAL TENDER NOTES BEFORE THE SUPREME COURT**, 193.

2. A bond payable in gold and silver coin, cannot be discharged by a tender of United States notes, issued under the Act of February 25th 1862. *Bronson v. Rhodes*, 251.

3. A bond payable, "in gold or silver coin," is satisfied by a payment in legal tender notes. *Murray v. Gale*, 381.

4. United States notes are exempt from state taxation. *Bank v. Supervisors*, 443.

**LIBEL.** See CORPORATION, 3.**LICENSE.**

1. Where A. gave B. a parol license to cut timber on his land, and B. a like license to flow his lands by a dam: it was held that though mutual, the licenses were independent, and either party might revoke his so far as it was unexecuted. *Dodge v. McClintock*, 62.

2. A license at law creates no estate in the lands of the licensor, but will justify or excuse any act done under it. It is revocable even when given for a consideration, but not if once executed. *Veghte v. The Raritan Water Power Co.*, 191.

**LIEN.** See DEBTOR AND CREDITOR, 3; VENDOR AND PURCHASER, 7.**LIMITATIONS.** See BILLS AND NOTES, 3.

1. The rights of the mortgagor and mortgagee are reciprocal, and when one is barred by the Statute of Limitations the other is also. *Arrington v. Liscom*, 123.

2. A party who has been in the exclusive adverse possession of lands for a period of time which, under the Statute of Limitations, vests him with a title thereto, may maintain an action against a party claiming under a record title, to have said adverse claim determined and adjudged null and void as against him. *Id.*

3. The Statute of Limitations is no bar to an action in this state (Maine) on a note made in another state, when the defendant has not resided here. *Brown v. Nourse*, 187.

4. A special statute enacting that demands against a bank must be presented within two years is legal. *Stevens v. St. Louis National Bank*, 381.

5. A petition that shows upon its face that the cause of action is barred by the Statute of Limitations, does not state facts sufficient to constitute a cause of action. *Zane v. Zane*, 444.

6. Will not run, between the death of the party and appointment of an administrator in another state, as to claims prosecuted there. *Hicks v. Clark*, 504.

7. The Maryland Code of Public Laws does not prevent a new promise to pay, made on Sunday, from removing the bar of the Statute of Limitations. *Thomas v. Hunter*, 699.

**LIS PENDENS.** See COURTS, 13.

1. Unless the parties to the actions are the same, a stay of proceedings will not be granted on the ground of lis pendens. *People v. Northern Railroad*, 638.

2. The plea of, must show that the same title, the same injury, and the same subject-matter are in controversy, in an action to recover land. *Larco v. Clements*, 699.

**MANDAMUS.**

1. A return to a mandamus should be sufficiently clear and full to enable the court to judge if the facts set forth, are all that are necessary. *Benbow v. Iowa City*, 252.



**MANDAMUS.**

2. Membership of a club which is purely literary or social or scientific, and does not own property, cannot be considered a right of property; nor is the right of meeting the other members a vested right of which courts can take cognisance. *Mandamus* is not the proper form of remedy for a member of such a club who is expelled. *Waring v. Medical Society*, 533.

**MARRIAGE.** See **HUSBAND AND WIFE**, I.**MASTER AND SERVANT.** See **NEGLIGENCE**, 4-6; **RAILROAD**, 6-19.

1. A laborer who leaves his employer, before his time of service has expired, can recover only *pro rata* on the basis of the contract price. *Patnote v. Sanders*, 508.

2. In the absence of an express agreement ten hours work will be considered a day's labor. *Brooks v. Cotton*, 570.

3. A master is liable to other servants in the same employment, if they are injured by any neglect of duty on his part. *O'Donnell v. Alleghany R. R.*, 757.

**MATERIAL MEN AND THEIR LIENS.**

1. Materials furnished on the credit of a building, are a sufficient consideration for the owner's subsequent promise to pay. *Landis v. Royer*, 694.

2. Repairs and alterations which do not change the exterior of a building into a new structure, confer no lien. *Miller v. Hershey*, 699.

**MILITARY SERVICE.** See **EVIDENCE**, 10.**MORTGAGE.** See **ATTACHMENT**, 1; **DEBTOR AND CREDITOR**, 1-2; **DEED**, 3; **HUSBAND AND WIFE**, 12; **LIMITATIONS**, 1; **VENDOR AND PURCHASER**, 1-5.

1. An entry by a mortgagee, in the name of the whole, upon one of several lots of wild land, conveyed by the same mortgage, and in the same county, would give him constructive legal possession of all. *Green v. Pettingill et al.* 64.

2. That a deed absolute on its face was really given as security for a debt and intended only as a mortgage, may be shown by parol proof. *Hogan v. Jacques*, 120.

3. A mortgage on a canal boat, or a copy thereof, by a statute of New York is required to be filed in the office of the auditor of the canal department, and within thirty days preceding a year another copy is required to be filed, or the mortgage shall be void against creditors and subsequent *bond fide* mortgagees and purchasers. *Herrick v. King and Others*, 124.

4. A tenant for years who offers to pay off a mortgage-debt has the right to redeem, and to have the mortgage delivered to him uncanceled. *Hamilton v. Dobbs*, 187.

5. The date of a mortgage is the day of its delivery. *Russell v. Carr*, 314.

6. The law will not note fractions of a day except to prevent injustice. *Id.*

7. In equity a conveyance, whatever form it may assume, will be treated as a mortgage, whenever it appears to have been taken as a security for an existing debt, or a contemporaneous loan. *Hinckley v. Wheelwright*, 590.

8. But on the other hand, parties capable of acting may make conditional contracts for sale of their property, and a vendor may make an absolute conveyance, subject to an agreement for a reconveyance, upon the repayment of the purchase-money, on or before a fixed day. *Id.*

9. Nor does the fact that parties stand in the relation of mortgagor and mortgagee prevent their dealing with each other as vendor and purchaser of the equity of redemption, if the mortgagee does not make use of his encumbrance to influence the mortgagor to part with his property at less than its value. *Id.*

10. The intention of the parties is, in such cases, what the courts seek to discover and enforce. *Id.*

11. As between grantor and grantee, where it appears that a conditional sale was a mere cloak to an irredeemable mortgage, equity will let in the grantor to redeem; but it is a matter of grave doubt, whether, under such circumstances, it will afford the grantee a remedy for the debt against the grantor. *Id.*

## MORTGAGE.

12. A mortgage of future-acquired chattels is valid only when the property mortgaged may be regarded as a part of, or *accretion to*, property in actual or legal possession of the mortgagor at the time of making the mortgage. *Wilson v. Seibert*, 608.

13. A mortgage of property in which the mortgagor has no present interest, and which he must acquire, if at all, in *substitution for* or independently of any property he now has, is not valid to create any lien which equity will recognise or enforce. *Id.*

## MUNICIPAL CORPORATION.

1. Neither the identity of a municipal corporation, nor its right to hold property devised to it, is destroyed by a change of its name. *Girard v. Philadelphia*, 245.

2. Is bound to keep the pavement in front of the market stalls in repair. *City of Savannah v. Cullens*, 314.

3. It is settled in Pennsylvania that the legislature may confer upon municipal corporations the power to assess the cost of local improvements upon the property benefited. *Hammett v. City of Philadelphia*, 411.

4. But such local assessments can only be imposed to pay for local improvements, clearly conferring special benefits on the properties assessed, and to the extent of those benefits. They cannot be imposed when the improvement is either expressed or appears to be for general public benefit. *Id.*

5. The paving of a street, changing a road into a street, and bringing the land fronting on it into the market as building lots, is a local improvement, with special benefits to the land fronting on it, and the cost of such paving may be assessed on the property benefited. *Id.*

6. But when a street is once opened and paved, and has thus become a part of the public highways of the city, the *repaving* of it, either with a new and different pavement, or by repairing the old one, is a part of the general duty of the corporation, and cannot be paid for by assessments on the adjoining properties. *Id.*

## NEGLIGENCE. See INFANT, 2; LANDLORD AND TENANT, 4; RAILROAD, 15.

1. It is not contributory negligence on the part of a person crossing a county bridge, knowing it to be unsafe, in the absence of distinct notice to him or the public not to use it. *Humphreys v. The County of Armstrong*, 62.

2. It is the duty of county commissioners knowing a bridge to be unsafe to render it safe, or else to close it up, so as to prevent the public using it. *Id.*

3. It is not the absolute duty of a railroad company to furnish a safe engine. Its duty is to use care and diligence to furnish such an engine. *Railroad Co. v. Thomas*, 154.

4. When an injury has occurred to a servant in consequence of a defect in an engine, the burden is on the servant to show negligence in the master, and it is not shifted by the fact that an injury has resulted from a defect. *Id.*

5. Notice to the proper officers or servants of the company is notice to the company, and will render it liable unless it uses proper diligence in repairing the defect; but if it has made an effort by a competent servant to repair, it is not liable. Failure to remedy the defect does not conclusively prove negligence on the part of the workmen, and if it did, he is a fellow-servant of the plaintiff, for whose negligence the company is not liable. *Id.*

6. The occupant of a second story is liable for the negligence of his servants in allowing a hydrant to flood the story below, and damage the goods of the occupant of said story. *Gass v. Callunry*, 381.

7. Must be direct and proximate to defeat an action by the widow of the deceased. *Meyer v. People's Railway*, 381.

8. The owner of a horse who allowed him to wander on the unenclosed land of another, where he fell into a well and was killed, cannot recover damages unless he shows that the defendant was guilty of *gross* negligence. *Calkins v. Mathews*, 447.

9. It is negligence in a passenger, or in an employee holding the relation of a passenger, to ride in the baggage-car. *O'Donnell v. Allegheny R. R.*, 757.

### NEGLIGENCE.

10. In an action whose *gravamen* is negligence, it is the duty of the plaintiff to show a case clear of contributory negligence. *Waters v. Wing*, 758.

11. Negligence is always a question for the jury, where there is any doubt as to the facts, or the inference to be drawn from them. *Penna. R. R. Co. v. Barnett*, 758.

12. It is negligence for a traveller to drive on a bridge just as a train is about to pass under it, if he has notice of its approach. *Id.*

### NEW TRIAL.

Granting or refusing a new trial is always in the discretion of the court trying the cause. *Anthony v. Eddy*, 445.

### NUISANCE.

1. Unless an individual citizen is *specially* injured by a public nuisance, he cannot bring a suit in his own name. *Higbee v. Camden & Amboy R. R. Co.*, 252.

2. The prosecution of a business, which renders the neighborhood uncomfortable, from smoke and noise, though not deleterious to health, will be restrained by injunction. *Ross v. Butler*, 252.

3. Continuance of, after notice to abate, renders party liable to indictment. *Vason v. City of Augusta*, 315.

4. Landlord not liable for nuisance on the premises of his tenant. *Id.*

5. Every continuance is a fresh nuisance in judgment of law, and an action for damages will lie against the continuer, without a request to abate it. *Conhocton Stone Co. v. B. & N. Y. Railroad*, 382.

6. The diversion of the waters of a navigable stream may be both a public and a private nuisance, and a person especially injured may have an action therefor. *Yolo v. City of Sacramento*, 670.

**OFFICE AND OFFICER.** See BOUNTY, 2; CONSTITUTIONAL LAW, 12, 13; EXECUTION, 3; INTERNATIONAL LAW, 1; SURETY, 3; TAXATION, 3; VENDOR AND PURCHASER, 22-23.

Public officers are liable in damages to all persons who may be injured through their malfeasance, omission, or neglect. *Lick v. Madden*, 701.

### PARENT AND CHILD.

1. Father may maintain an action for debauching his daughter under age, though she does not live with him. *Greenwood v. Greenwood*, 316.

2. A minor having enlisted with his father's consent, is entitled to the bounty paid by the town to which he was accredited. *Baker v. Baker*, 509.

3. A minor son enlisting in the army with his father's consent, is entitled to recover from his father all the money he earned and sent home during such service. *Ayer v. Ayer*, 636.

### PARTITION. See COURTS, 2.

1. Court will set aside and quash return of commissioners of partition when made on wrong principles, or where there is great and evident inequality in the division. *Hay v. Estell*, 125.

2. Parol promise by tenant in common to convey, no bar to suit for partition. *Polhemus and Wife v. Hodson*, 127.

3. A decree in partition, that such portions be allotted to the different tenants in common as they have respectively improved, is correct. *Seale v. Soto*, 509.

4. All the tenants in common should join in a partition. *Sutter v. San Francisco*, 670.

### PARTNERSHIP. See SURETY, 5.

1. A partner bound to account must give a clear and distinct statement of his business, referring to particular books and the pages if necessary. *Gordon's Adm. v. Hammell*, 187.

2. A participation in the profits, to constitute a partnership, must be a general participation in the profits as such. *Hargrave v. Conroy*, 253.

3. A share of the profits as compensation for services, will not constitute

**PARTNERSHIP.**

a partnership, unless its gross inadequacy shows it to be a mere pretext to avoid responsibility. *Hargrave v. Conroy*, 253.

4. A partner with the knowledge of his copartner converted to the use of the firm money received by him as a United States deputy collector of internal revenue. *Held*, that a bond of the firm given to indemnify the sureties of the deputy collector was valid as a partnership obligation. *Wharton v. Clements*, 299.

5. Such bond valid as an indemnity although executed before the sureties had made good the defalcation, and although in form it was a bond for the payment of money. *Id.*

6. When partnership property is sold under separate executions against the partners individually, the proceeds represent the several interests of the partners and not that of the partnership. *Vandike's Appeal*, 316.

7. A member of a ditch company has no general authority, by virtue of such membership to bind the company by his contracts, like a member of a partnership. *McConnell v. Denver*, 505.

8. Fraud is sufficient ground to dissolve an unexpired partnership. *Cottle v. Leitch*, 509.

9. Levy on land of a partner for partnership debt, cannot be defeated by an attachment of individual creditors. *Bowker v. Smith*, 675.

10. Partner may withdraw at any time and cause technical dissolution of firm. *Stemmer's Appeal*, 637.

11. Equity will not decree dissolution and appoint a receiver unless on good grounds. *Id.*

12. The joint creditors of a partnership, have an equity to prevent the transfer and sale of the property of the firm, among the members where the same is fraudulent. *Flack v. Charon*, 670.

13. The members of a partnership are not jointly liable in an action for a fraud committed by one of the partners. *Stewart v. Levy*, 601.

14. Each partner being liable *in solido* for the firm engagements, has a right to have the firm assets applied in the first instance to the payment of the firm debts. *Manhattan Ins. Co. v. Webster*, 757.

15. The interest of a partner is only his proportion of the capital or profits after all the debts are paid. *Id.*

16. A partner has an insurable interest in the entire stock, and on the receipt for a loss of insurance he must account to the firm. *Id.*

**PATENT.**

1. For chemical substances should state the component parts with clearness and precision. *Tyler v. City of Boston*, 253.

2. OUR PATENT SYSTEM, 321.

3. Where the question is on the validity of a patent the jurisdiction of the United States courts is exclusive. *H. T. Stemmer's Appeal*, 637.

4. In a joint invention, each party should invent or discover something essential to the whole result. *Id.*

5. A joint patent taken out on the sole invention of one, or a sole patent on an invention of more than one, is void. *Id.*

**PAYMENT.** See AGENT, 6 ; DEBTOR AND CREDITOR, 14.

1. The doctrine that bank bills are a good tender unless objected to at the time, only applies to current bills which are redeemed at the counter of the bank, and pass at par value in business transactions in the place where offered. *Ward v. Smith*, 354.

2. Payment of a check in the bills of a suspended bank, not known to the parties to be suspended, is not a satisfaction. *Id.*

**PHOTOGRAPHS.**

THE LEGAL RELATIONS OF PHOTOGRAPHS, 1.

**PLATFORM.** See RAILROAD, 13-14-15.**PLEADING.** See EXECUTOR AND ADMINISTRATOR, 3-5 ; LIS PENDENS, 2.

1. After a verdict for plaintiff, judgment will not be arrested because the declaration alleges that the "*Inhabitants of a town*" were bound to keep a

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highway in repair, instead of alleging that the town was so bound. *Flanders v. Stewartson*, 61.

2. A reversal in a court of last resort, *remanding a case*, cannot be set up as a bar to a judgment in an inferior court on the same case. *Aurora City v. West*, 254.

3. The rule that judgment will be given against the party who commits the first fault in pleading does not apply to faults of mere form. *Id.*

4. A cause of action for false imprisonment may be joined with a cause of action for slander, when both arise out of the same transaction. *Harris v. Avery*, 437.

5. In declaring upon a special contract the entire consideration must be set forth, and must be proved as alleged. *Smith v. Webster*, 445.

6. Where the cause of action in the declaration is single and indivisible, a plea of tender is an admission of the cause of action as laid. *Dow v. Epping*, 445.

7. In an action by assignee of a *chose in action* not negotiable against the maker, it is unnecessary to aver in the declaration the consideration of the transfer. *Smiley v. Stevens*, 648.

## PRACTICE. See HIGHWAY, 3-4.

1. In New Hampshire any one who has rights involved may be admitted to prosecute or defend an action. *Parsons v. Eureka Powder Works*, 446.

2. There can be no judgment against a trustee in an attachment suit of real estate, unless there is first a judgment against the principal defendant, and where there is a want of service upon him, the action will be dismissed on trustee's motion. *Washburn v. Mining Co. and Allen Trustee*, 634.

3. An instrument in writing agreeing to pay \$150 every month for the privilege of taking clay from certain land, is an instrument for the payment of money within the Affidavit of Defence Law. *Johnston v. Cowan*, 755.

4. Filing the agreement is a copy of the claim, and no more could be recovered than was due on it. *Id.*

## PRIZE.

The *bond fide* purchase by a neutral, of a vessel of a belligerent, even though the same is dismantled, will not protect it from recapture by the other belligerent. *The Georgia*, 250.

## PROFESSIONAL ETHICS.

THE CASE OF MR. BRADLEY AND THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, 129, 305.

## PROMISSORY NOTE. See BILLS AND NOTES.

## QUO WARRANTO.

1. Is not a writ of right. *Com. ex rel. McLaughlin v. Cluley*, 62.

2. The enactment that writs of *quo warranto* may be issued on the suggestion of any person desiring to prosecute the same, means any person having an interest to be affected. *Id.*

## RAILROAD. See AGENT, 7; COMMON CARRIER, 6, 7; DEBTOR AND CREDITOR, 4; NEGLIGENCE, 3.

1. A charter granted by two states to a company to construct a railroad is not only a contract with the company, but a compact between the states. *The Cleveland and Pittsburgh Railroad Co. v. Speer*, 63.

2. Connecting lines of railroad may lawfully agree to divide the fares unequally. *Sussex Railroad v. Morris and Essex*, 126.

3. A contract between railroad companies using the same gauge, to transport passengers and freight continuously over both lines, does not imply a contract on the part of either company that it will not change the gauge of its road. *Id.*

4. If a passenger is ready and willing to pay his fare when demanded, a railroad company is bound to carry him, if there is room in the cars. *Farbell v. Central Pacific Railroad Co.*, 187.

5. A railroad company in its character of master is responsible to its

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employees for the proper construction of its road, its adjuncts and equipments, and the selection of competent and skilful subordinates to supervise, inspect, repair, regulate, and control its operations. If it fails in any of its duties in these respects, and its servant thereby sustains injury, he may recover. *Warner v. Erie Railway Co.*, 209.

6. If, however, these obligations are once performed, and its structures are properly made, and it employs from time to time competent and trustworthy agents to examine and test the continued sufficiency of such structures, and these tests are applied with the frequency and in the manner which time and experience have sanctioned, no action will lie though its structures turn out to be insufficient and the servant in consequence is injured. *Id.*

7. Where, under such circumstances, a bridge belonging to the company fell while the plaintiff in the course of his employment was passing over it upon a train, *Held*, in the absence of notice of its insufficiency, that it was error to leave the question of negligence to the jury. *Id.*

8. A through ticket over three several distinct lines of passenger transportation, issued in the form of three tickets on one piece of paper, and recognised by the proprietors of each line, is to be regarded as a distinct ticket for each line. *Knight v. Railroad Co.*, 654.

9. The rights of a passenger purchasing such a ticket, and the liabilities of the proprietors of the several lines recognising its validity, are the same as if the purchase had been made at the ticket office of the respective lines. *Id.*

10. Common carriers of passengers are not bound to insure the absolute safety of their passengers; but they are required to exercise the strictest care consistent with the reasonable performance of their contract of transportation. *Id.*

11. To render them liable for an injury to a passenger while under their charge, it is enough if it was caused solely by any negligence on their part, however slight, if, by the exercise of the strictest care and precaution, reasonably within their power, the injury would not have been sustained. *Id.*

12. Where a railroad company make a wharf subsidiary and necessary to the proper use and enjoyment of their road, *it was held*, in an action to recover for an injury on the wharf,

(1.) That the defendants are bound to exercise the same degree of care, in making the wharf safe and convenient for their through passengers to travel over, as is required of common carriers of passengers, although they required them to disembark at their depot, forty rods distant from the steamboat; and,

(2.) That this liability continued until, in the ordinary course of their passage over the wharf, they reached the point where the liability of the steamboat company commenced. *Id.*

13. The platform of a railroad company at a station is in no sense a public highway. There is no dedication to public use as such. *Gillis v. Railroad Co.*, 729.

14. The platform is for the accommodation of passengers, and being unenclosed, persons have the privilege but have not the legal right of walking over it for other purposes. *Id.*

15. The owner of property is not liable to a trespasser or to one who is on it by mere permission or sufferance, for negligence of himself or servants, or for that which would be a nuisance in a public street or common. *Id.*

16. To persons who come on to a platform to meet or part with passengers, or who stand in such relation to the company as requires care, the company is bound to have the structure strong enough to bear all who could stand upon it. *Id.*

17. The owner is bound to have the approach to his house sufficient for all visitors on business or otherwise, but if a crowd gathers on it to witness a passing parade, &c., and it breaks down, though not sufficient for its ordinary use, he is not liable to one of the crowd who might be injured. *Id.*

18. Is bound to furnish a safe and sufficient roadway to its servants as well as others travelling over it. *O'Donnell v. Allegheny R. R.*, 757.

19. A carpenter working for a company, is not to be esteemed as employed

**RAILROAD.**

in the same general service with the hands running the trains, so as to relieve the company from responsibility for injury to him from their negligence. *O'Donnell v. Allegheny Railroad*, 757.

20. A railroad company is liable for an injury resulting from an act, lawful in itself, but negligently performed. *Pennsylvania R. R. Co. v. Barnett*, 758.

**RECEIPT.** See **EVIDENCE**, 14; **STAMPS**, 1.

**RECEIVER.** See **PARTNERSHIP**, 11.

A receiver will only be appointed on bill filed for that purpose, and not against a complainant upon defendant's application. *Leddel v. Starr*, 185.

**RECORDS.**

The records in public offices in other states, may be proved by a sworn copy, or certificate according to the Act of Congress. *Condit v. Blackwell*, 188.

**RELEASE.** See **TRESPASS**, 2.

**REPLEVIN.**

1. The right to the possession, is all that is necessary to maintain replevin. *Sprague v. Clark*, 510.

2. Title to property in replevin not changed, by issuing writ and giving bond. *Keyser v. Stien*, 576.

3. Surety in replevin-bond who takes possession of property, has no better rights than plaintiff in the suit. *Id.*

**REVERSION AND REMAINDER.** See **TENANT FOR LIFE**, 2.

The estate in remainder of an infant will not be sold when the benefit is doubtful. *In the matter of Sale of Lands of Steele*, 126.

**RIPARIAN OWNER.**

1. The common law rule of riparian ownership applies to the survey and sale of public land (under an act of Congress), where the land borders on a stream not navigable, but on navigable streams the title of the owner stops at the stream, and does not come to the *medium filum*. *Railroad Co. v. Shurmeir*, 254.

2. Slow accretions to the bank of a river become the property of the land-owner on whose side they occur. *Gerrish v. Clough*, 446.

**SALE.** See **CONFEDERATE STATES**, 1; **VENDOR AND PURCHASER**, 22; **WILL**, 1.

**SET-OFF.** See **BANK**, 2; **EJECTMENT**, 4.

1. A purchaser buying goods from a broker which are not in his possession cannot set off a claim against the broker in a suit for the purchase-money. *Dunn v. Wright*, 59.

2. A debt not in judgment cannot be set off to a judgment. *Thorpe v. Wegesfarth*, 62.

3. There is no right to tender a chose in action against the creditor in payment of a judgment or execution. *Id.*

**SHERIFF.** See **ELECTION**, 1; **EXECUTION**, 5.

**SPECIFIC PERFORMANCE.** See **EQUITY**, 14.

1. A delay of fifteen years is a strong ground for refusing a decree of specific performance. *Eyre v. Eyre*, 119.

2. No decree can be made in a suit by husband and wife for specific performance, where the wife dies, and her children have not been made complainants. *Hand v. Jacobus*, 122.

**STAMPS.**

1. The receipt of an express company for goods delivered to them is not subject to a stamp. *Belger v. Dinsmore*, 188.

2. An internal revenue stamp is no part of a note. *Hallock v. Jaudin*, 188.

3. A letter stating that a note will be paid by a creditor, does not require a stamp. *Boyd v. Hood*, 317.

**STAMPS.**

4. The accidental omission to stamp a note, at the time it is made, will not invalidate it. *Green v. Lowry*, 317.

5. A judgment on an unstamped bond is not void. *Ritter v. Brendlinger*, 638.

6. A promissory note made since the 30th day of June 1864 cannot be stamped in open court, and then read to the jury. *Wigham v. Pickett*, 701.

**STEAMBOAT.** See **COMMON CARRIER**, 2.**STOCK.** See **GUARDIAN** ; **TRUST AND TRUSTEE**, 4-7.

1. The signing of a certificate, that certain parties have agreed to form a bank, with the number of shares affixed to the several signatures, renders the subscribers liable to the bank as stockholders. *Cole, Receiver v. Ryan*, 379.

2. A transfer of stock *bond fide*, renders the transferee liable for the amount unpaid. *Id.*

**STREAM.** See **NUISANCE**, 6 ; **RIPARIAN OWNER**, 1-2.**STREET.** See **MUNICIPAL CORPORATION**, 5-6.**SUBROGATION.**

1. Subrogation is purely an equitable result, and depends on facts to develop its necessity, that justice may be done. *Mosier's Appeal*, 63.

2. Subrogation is applicable wherever a payment is made under a legitimate and fair effort to protect the ascertained interests of the party paying, and where intervening rights are not legally jeopardized or defeated. *Id.*

**SURETY.** See **ESTOPPEL**, 9 ; **REPLEVIN**, 3.

1. Mere forbearance by a creditor to the principal debtor, however prejudicial it may be to the surety, will not have the effect of discharging him from his liability. *Railroad v. Shaeffer*, 110.

2. The case of the sureties of a railroad officer, charged with the receipt and disbursement of money, is within the rule ; and the company is not bound to dismiss the officer as soon as any default becomes known, and to give notice to the sureties that they may take measures to secure themselves by proceedings against the principal. *Id.*

3. Where an officer of a corporation violates his duty, knowledge on the part of other officers of the corporation of the default, or even connivance in it, does not discharge the sureties. *Id.*

4. Two or more persons severally signing a promissory note as sureties do not thereby incur a joint liability. *Bunker v. Tufts*, 188.

5. Several sureties paying the debt of their principal is no evidence of a partnership between them. *Id.*

**TAXATION.** See **COIN**, 2 ; **LEGAL TENDER NOTES**, 4 ; **VENDOR AND PURCHASER**, 14.

1. An assessment of a tax in St. Louis, against a lot, is not vitiated by an error in respect to the ownership thereof. *City of St. Louis v. De Noud*, 383.

2. The income tax of 2 per cent. under the Act of February 1865, is not in violation of the Constitution. *Glasgow v. Rouse*, 383.

3. A tax collector has no right to take money to pay taxes from a drawer in a bank, without the consent of the officers. *National Bank of Sandy Hill v. Fancher*, 384.

4. Certificates of indebtedness issued by the United States for supplies furnished to carry on the war, are exempt from state taxation. *The Banks v. The Mayor*, 447.

5. A writ of error lies from the Supreme Court of the United States, to the decision of a state court against a right, privilege, or immunity claimed under the Constitution. *Id.*

6. A town summoned as trustee cannot apply tax due by the defendant *cestui que trust*, to the payment of a debt which the town owes said defendant. *Johnson v. Howard*, 638.

**TELEGRAPH.** See **BROKER**, 4.



**TENANT IN COMMON.** See **LANDLORD AND TENANT**, 1; **PARTITION**, 2-4.

A conveyance by any number of tenants in common, less than the whole, though not void, cannot be made to prejudice the tenants not joining in the deed. *Gates v. Salmon*, 510.

**TENANT FOR LIFE.** See **EQUITY**, 6.

1. Tenant for life is bound to repair the ordinary wear and tear to the premises. *In the Matter of Lands of Mary E. Stull*, 127.

2. The accumulated surplus or undivided earnings of an incorporated company are part of its capital, and as such belong to the remainder-man; but an extra dividend declared out of the earnings belongs to the life tenant. *Van Doren v. Van Doren's Trustee*, 189.

**TENANT FOR YEARS.** See **MORTGAGE**, 4.

**TENDER.** See **PAYMENT**, 1; **SET-OFF**, 3.

**TIMBER.** See **TRESPASS**, 4; **WASTE**.

**TOWN.** See **ASSUMPSIT**, 4; **BOUNTY**, 1; **INTERNATIONAL LAW**, 2; **TAXATION**, 6.

1. Towns owe a statutory duty to travellers, for the breach of which the party injured may maintain an action, to remove from the margins of their highways objects unlawfully deposited there, which, by their frightful appearance, make it unsafe to travel the road with ordinary horses. *Morse v. Town of Richmond*, 81.

2. The duty of the town to remove the obstruction from the highway does not attach until they know of it, or ought to know of it, nor while it is upon the highway a reasonable time for the purposes of transportation over it. *Id.*

3. Though a town is not bound to work the whole width of the road where the travel does not require it, yet they have a right to control the whole width and have a corresponding duty. If they suffer objects to remain deposited on the margin which, by their frightful appearance, make the whole road unsafe, they will be liable for such accidents by fright as are the natural result of their neglect. *Id.*

4. Towns are held to a higher responsibility with reference to removing deposits of private property which are placed on the road without right and obstruct public travel by their frightful appearance, than with reference to removing equally dangerous objects which either are incident to the nature of the soil and country, or are thrown upon the margin in process of constructing the road. *Id.*

5. The selectmen of a town may appoint an agent to build or repair roads or bridges. *Dow v. Epping*, 445.

**TRADE.** See **CONTRACT**, 5; **FIXTURES**, 1.

**TRADE-MARK.**

1. A trade-mark having upon it a false statement which did not, and could not produce any effect upon the purchasers of the article, is nevertheless so tainted by the falsehood that equity refuses to protect it. *Palmer v. Harris*, 137.

2. A trade-mark for a brand of segars, manufactured in New York, had upon it, in Spanish, words, which interpreted into English, mean: "Factory of segars from the best plantations de la Vuelta Abajo, calle del Agua, Habana." Equity refused, on the ground of the falsehood, to enjoin a printer from counterfeiting the device, and supplying the trade with his imitations. *Id.*

3. The complainant having first appropriated and applied the name of "Charter Oak" to a certain pattern of stoves manufactured and sold by him, will be protected by injunction in the exclusive use of the name as a trade-mark. *Filley v. Fassett*, 402.

4. Any contrivance, design, device, name, or symbol, which points out the true source and origin of the goods to which it is applied, or which designates the dealer's place of business, may be employed as a trade-mark, and the right to its exclusive use will be protected by the courts. *Id.*

5. The appropriation of any prominent, essential, or vital feature of a trade-

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mark by another, is an infringement. If the trade-mark is simulated in such manner as probably to deceive customers, the piracy may be checked by injunction. *Filley v. Fassett*, 402.

6. The statute of Missouri providing for the filing of a description of any trade-mark sought to be used, was not designed to abridge or weaken the right to any trade-mark which may be acquired in the usual way. It does not authorize the appropriation by one party of a trade-mark the title and ownership of which belongs to another. *Id.*

**TRESPASS.**

1. Joint trespassers may be sued together, or any of them separately, and the non-joinder of the others is no defence. *Bailey v. Berry*, 270.

2. A release to one of several joint trespassers will discharge all; but it must be a technical release, not merely a covenant not to sue, or other instrument amounting to a release by implication merely. *Id.*

3. An agreement with a portion of such joint trespassers to withdraw the suit as to them, for a certain sum of money, will not discharge the others. *Id.*

4. A wrong-doer cannot dispute the title of one in the possession of land and claiming as owner, in an action against him for cutting down and carrying away timber. *Nelson v. Mather*, 447.

5. A person resisting one specially authorized, to serve process, if cognizant of the fact, is liable in an action of trespass for an assault and battery. *Leach v. Francis*, 511.

6. The plaintiff was unlawfully seized by the defendants, carried thence three miles and confined in a room several hours, and thence to a town meeting, where he took an oath to support the Constitution of the United States, and was discharged. In the trial of an action of trespass, based upon these facts, the plaintiff claimed, (1) Actual damages resulting from his seizure and detention; (2.) Damages for the indignity thereby suffered; and (3.) Punitive damages. *Held:—*

7. That the plaintiff was entitled to recover full pecuniary indemnity for the actual corporeal injury received, and for the actual damages directly resulting therefrom, such as loss of time, expense of cure, and the like;

8. That the declarations of the plaintiff, made prior to the unlawful arrest and tending to provoke the same, not being a legal justification thereof, are inadmissible in mitigation of the actual damages; but,

9. That such declaration made on the same day, and communicated to the defendants prior to such arrest, together with all the facts and circumstances fairly and clearly connected with the arrest, indicative of the motives, provocations, and conduct of both parties, are admissible upon the question of damages claimed upon the other two grounds. *Prentiss v. Shaw et al.*, 712.

**TROVER.**

It is no defence to an action of trover that the property sold was government bonds payable to bearer, provided the principal was not the *bond fide* purchaser. *Kimball, Executor, v. Billings*, 189.

**TRUST AND TRUSTEE.** See **DECEDENT'S ESTATE**, 2; **EQUITY**, 4-7; **PRACTICE**, 2.

1. Where a deed expresses a nominal consideration never paid, no use results to the grantor. *Hogan v. Jacques*, 120.

2. A trust estate cannot be sold by execution. *Id.*

3. The title of a *bond fide* purchaser from one, who bought at an illegal sale of a trustee or executor, will not be set aside. *Booraem v. Wells*, 128.

4. The holder of stock as trustee has *prima facie* no right to pledge it as security for his private debt, and one who takes it under such circumstances does so at his own peril. *Shaw v. Spencer*, 219.

5. The word "trustee" in the certificate is notice to all persons to whom the certificate may be delivered, sufficient to put the taker on inquiry as to the nature of the trust and the lawfulness of the pledge. *Id.*

6. No usage of brokers or course of business can avail against these rules of law, and therefore evidence of such usage is inadmissible. *Id.*

## TRUST AND TRUSTEE.

7. Where the equitable owner of stock which has been pledged unlawfully by the trustee, has given notice of his rights to the pledgee, his mere presence and failure to object to the payment by the pledgee, of an assessment on the stock, does not stop him from the legal assertion of his title, though equity will require him to refund the amount so paid. *Shaw v. Spencer*, 219.

8. A trustee is only bound to use ordinary diligence in the preservation of the trust funds. *Campbell v. Miller*, 318.

9. Trustees cannot retire with their counsel, and prepare their answers to depositions, they must be written by the magistrate. *Morrison v. Annis*, 571.

10. One cannot be made liable as trustee, for securities which he holds as the agent of another. *Smith v. Wiley*, 634.

11. Persons who have traded with and given credit to the trustee of a married woman's separate estate, cannot, in the first instance, go into chancery to have their debts paid out of the trust estate. *Pollard et al. v. Cleveland et al.*, 702.

12. Where A. agrees with B. that he will purchase a sheriff's certificate of sale of a mining claim, and take an assignment in his own name for the joint benefit of both, and A. makes the purchase, B. furnishing his proportion of the money, and takes a sheriff's deed in his own name, a resulting trust arises, and A. holds a part of the property in trust for B. *Dikeman v. Norrie*, 702.

## VENDOR AND PURCHASER. See ASSUMPSIT, 6; CONFEDERATE STATES, 1; DEBTOR AND CREDITOR, 8; EJECTMENT, 6.

## I. Of Real Estate.

1. A conveyance of part of mortgaged premises "subject to the payment of all liens now on the same," does not create a personal obligation on the vendor to pay the mortgage or any part of it; but it makes the part so conveyed as against the residue subject to its proper proportion of the mortgage-debt, and to that only. *Hoy v. Bramhall*, 124.

2. A purchaser who buys land at a lower price by representing a mortgage as an encumbrance, which was not, will be compelled to make good the amount of it to the vendor. *Winans v. Winans*, 186.

3. The rule that the title of a purchaser acquired under a judicial sale will be held good, though the judgment be afterwards reversed, applies to all purchasers, whether parties to the suit or not. *Gordon v. Canal Co.*, 279.

4. By a decree of the Circuit Court, a claim was held to be a lien on an entire canal. From this decree an appeal was taken to the Supreme Court, pending which the canal was sold under the decree, and the plaintiff in the decree became the purchaser. The Supreme Court reversed the decree on the ground that the claim was a lien on a section of the canal only. *Held*, that plaintiff's title under the sale was not affected by the reversal. *Id.*

5. A purchaser is not entitled to the rents accruing between the time of sale and delivery of the deed, on the foreclosure of a mortgage. *Mitchell v. Bartlett*, 441.

6. Vendee will not be deemed to have assented to a contract for sale of land, which only binds one of two vendors. *Snyder v. Neefus*, 639.

7. The vendor of real estate, retains a lien for the unpaid purchase-money, even after conveyance of the legal title to the vendee. *Schwarz v. Stein*, 702.

8. The possession of land by a stranger to the record title, is sufficient notice of a claim, to put a purchaser on inquiry. *Pell v. McElroy*, 703.

## II. Of Chattels.

9. An unconditional delivery of goods without payment, does not pass the title, where there has been fraudulent misrepresentation. *Hicks v. Campbell*, 190.

10. A vendor cannot demand immediate payment of the purchase-money, after an agreement to extend the time of such payment. *Cythe v. La Fontain*, 190.

11. A vendee cannot rescind a contract of sale after receiving part of the property without an offer to restore. *Woodruff v. Peterson*, 190.

**VENDOR AND PURCHASER.**

12. The doctrine of *fraud in law* as applicable to change of title in personal property without change of possession is merely a kind of rule of evidence prescribing what facts proved shall be held to conclusively show the existence of fraud, and thus creating a kind of estoppel *in pais*. *Daniels v. Nelson*, 149.

13. The rule rests upon grounds of policy only, and its application has been limited to creditors and *bond fide* purchasers. It does not apply in favor of a state or county levying a tax. *Id.*

14. Therefore, a chattel belonging to A. cannot be levied upon for a tax due by B., although it formerly belonged to B. and still remains in his possession. *Id.*

15. The title to articles too ponderous for actual delivery, may pass by symbolical delivery. *Thompson v. B. & O. Railroad Co.*, 318.

16. Title to property will not pass where anything remains to be done to ascertain it. *Camp v. Norton*, 319.

17. Refusal to deliver after demand, entitles the vendee to an action for non-delivery. *Id.*

18. The consummation of the sale of a chattel, is the delivery, and subsequent agreements as to time of payment do not alter it. *Blow, Adm., v. Spear*, 383.

19. Where covenants are mutual and dependent, performance or an offer to perform, on the one part, is a condition precedent to the right to insist upon performance on the other part. *Hull v. Grigsby*, 511.

20. One induced to purchase part of a vessel on a fraudulent representation of the cost price, is entitled to recover the over-payment. *Pendergast v. Reed*, 695.

21. Where the title to property is to remain in the seller, until the payment of the price upon a fixed day, such payment is a strict condition precedent, and the right of property is not vested in the purchaser. *Putnam v. Lamphier*, 701.

22. The sale of a horse belonging to the United States, by an officer of the army, to a *bond fide* purchaser, but without the authority or assent of the government, will not pass the title against the latter. *Johnson v. Frisbie*, 756.

23. Persons dealing with agents or officers in regard to public property, are bound to know the extent of their authority. *Id.*

**VESSEL.** See ADMIRALTY, 3-4-5; PRIZE; VENDOR AND PURCHASER, 20.

1. Congress has the exclusive power to provide where the evidence of title of registered and enrolled vessels shall be recorded. *Wood v. Stockwell*, 190.

2. The state legislature has no authority, directly or indirectly, to add to or dispense with the requirements of section 1 of the Act of Congress of July 29th 1850, entitled an "Act to provide for recording the conveyances of vessels." *Id.*

**WAR.** See INTERNATIONAL LAW, 1-14; TAXATION, 4.**WAREHOUSEMAN.** See BAILMENT, 3.**WARRANTY.**

Covenant to warrant and defend against all persons claiming premises, means persons having valid claims. *Gleason v. Smith*, 632.

**WASTE.** See WITNESS, 3.

An injunction will be granted to prevent a tenant from committing waste, by cutting timber, or an action will lie to recover damages by the remainderman. *McCay v. Wait*, 191.

**WATERS AND WATERCOURSES.** See DAMAGES, 3.

1. A right to divert the water of a river, is an incorporeal hereditament, and can pass only by instrument under seal. *Veghte v. The Raritan Water Power Co.*, 191.

2. A party will be liable for injury resulting from neglect to keep a ditch in repair, which passes through another's land. *Richardson v. Kier*, 192.

3. A party is bound to use as great care in managing his ditch, to avoid

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injury to another, as a prudent person would, were the property exposed his own. *Campbell v. B. R. & A. W. Co.*, 503.

4. The value of a water ditch is its capacity, and the market value of water in the vicinity. *Clark v. Willett*, 504.

**WILL.** See **CHARITABLE USES**; **EXECUTOR AND ADMINISTRATOR**, 2.

1. If a will direct executors to sell a certain tract after the death of a certain legatee, and contains no other power of sale, a sale in the lifetime of such legatee is void. *Booraem v. Wells*, 127.

2. A power of appointment given by will, to devise certain property among such benevolent, religious, or charitable institutions as may be deemed proper, is void, as being too vague and indefinite. *Norris v. Thompson's Ex'rs*, 245.

3. Neither age, nor sickness, nor extreme distress, nor debility of body will disqualify a person from making a will, if sufficient intelligence remain, and such person is free from unlawful influence. *Higgins v. Carlton*, 255.

4. Although a will may be ineffectual to pass land in another state, because not attested by subscribing witnesses, yet an heir at law to whom a legacy is given from the testator's Pennsylvania estate, the will being valid in this state, will be put to his election, and will not be permitted to claim the gift without giving assent to everything contained in the instrument. *Van Dyke v. Van Dyke*, 462.

5. The English rule that cases in which a legacy is given upon the *express* condition that the legatee shall give up his claim to real estate, are distinguishable from those in which it is clearly *implied*, rests upon no sufficient reason and cannot be satisfactorily explained. *Id.*

6. The doctrine of equitable election is grounded upon the ascertained intention of the testator. *Id.*

7. Equitable election rests upon the principle of compensation; and not of forfeiture, which applies only to the non-performance of an express condition. *Id.*

8. Courts of equity in Pennsylvania have jurisdiction in cases of election on the ground of *trust*; although the case arises under a will, and bears incidentally upon the settlement of a decedent's estate. The jurisdiction of the Orphans' Court is concurrent, but not exclusive. *Id.*

9. A copy may under certain circumstances be proved as the will of a deceased person. *Dudley v. Wardner*, 511.

10. No particular language is necessary to create a charge on land; the intention to charge is to be carried out whenever it is discoverable from anything in the instrument. *Okeson's Appeal*, 703.

11. A conveyance of land, in trust to pay the proceeds to the grantor for life, then to his wife for life, and after the death of both, to be sold, and certain specified sums to be paid to grantor's children, is not in the nature of a will and cannot be revoked. *Ritter's Appeal*, 704.

12. The following instrument: "I wish five thousand dollars to go to John C. Cole in the event of my dying intestate, and the balance of my property to go to Robert Beatie, to be disposed of by him as his judgment may dictate," if properly executed and witnessed, is testamentary in its character, and is a will. *Estate of Wood*, 704.

**WITNESS.** See **CRIMINAL LAW**, 3.

1. Objection to witness on ground of incompetency by reason of interest, must be made in time for other party to remove it if possible, or to supply the want by other testimony. *Graham v. Berryman*, 128.

2. The Act of 1864, ch. 280 Maine, allowing a person charged with crime to be called as a witness at the trial "at his own request, but not otherwise," is constitutional. *State v. Bartlett*, 184.

3. The opinion of a witness as to waste committed by a tenant for life, is not admissible in evidence. *Woodward v. Gates*, 319.

4. Not a resident of this state, is entitled to mileage for the whole distance travelled. *Ducher v. Justices of Inferior Court*, 320.

**WITNESS.**

5. An interested witness cannot be offered to purge himself of his interest by his own *voire dire*. *Coal Co. v. Foster*, 368.

6. The wife of a minor's next friend, is a competent witness for the administrator, who has been substituted, after suit brought by the next friend. *Taylor v. Grand Trunk R.*, 571.

7. The testimony of a physician is admissible although his knowledge is derived from study alone. *Id.*

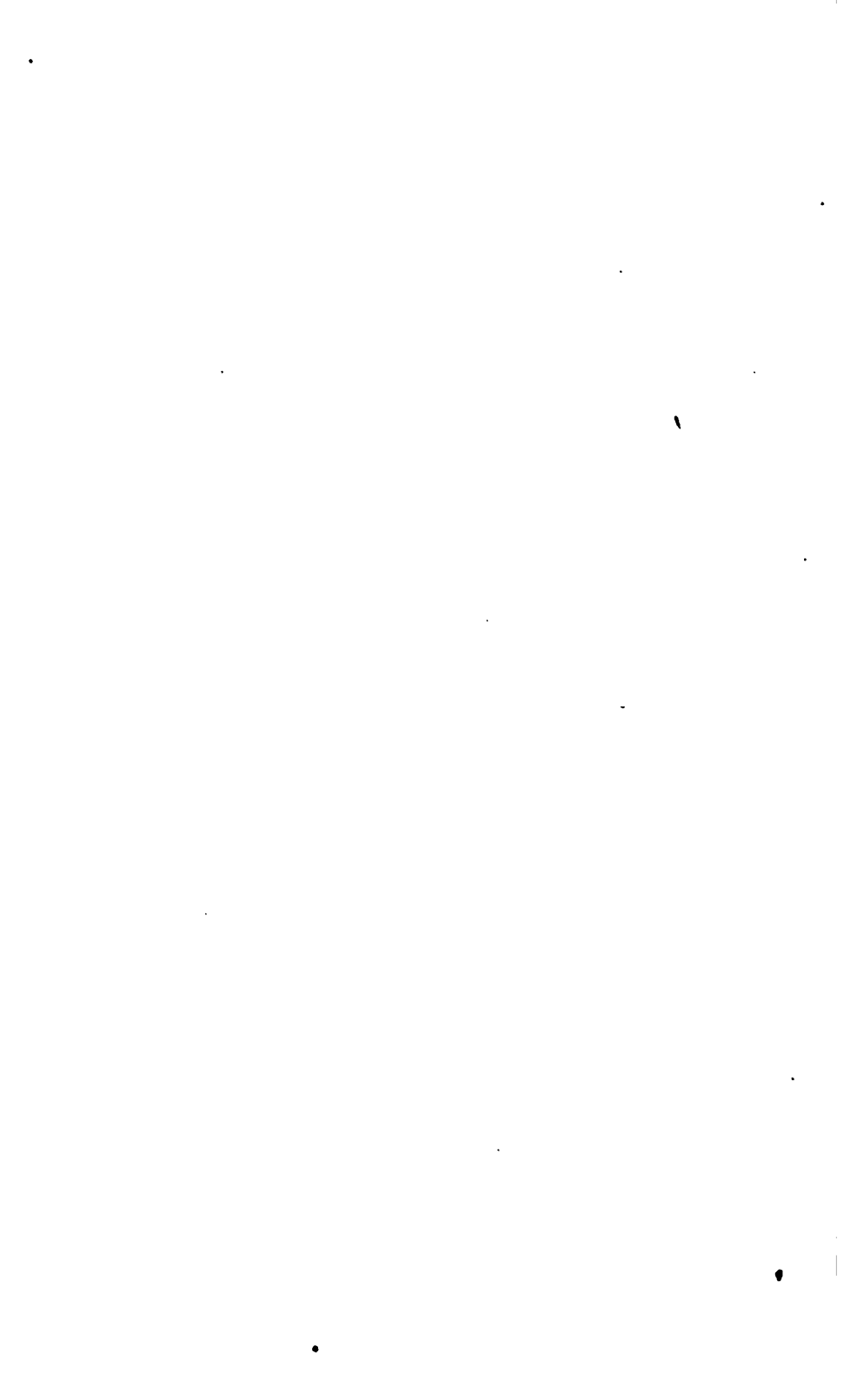
8. Party to a suit, not allowed to testify, when adversary is executor or administrator. *Brown v. Brown*, 576.

9. The rule is not universal that a witness must state facts and not opinions. *Town of Cavendish v. Troy*, 639.

10. Death of one party to cause of action, is ground for excluding the survivor from testifying. *Hollister, Adm. of Barrows, v. Young*, 639.

11. A witness who was a lawyer being under examination was questioned touching a certain conveyance made to him by the bankrupt and wife and a subsequent conveyance by him to the wife, and refused to testify thereon as matter within the privilege of confidential communications between attorney and client. *Held*, on the facts stated the questions were proper and must be answered, and are not within such privilege. *In Re Bellis*, 747.

END OF VOL. XVII.













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